IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. [illegible]

RODOLFO SIFUENTES,

PETITIONER,

-vs-

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE

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No._____

RODOLFO SIFUENTES,

PETITIONER,

-vs-

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Rodolfo Sifuentes respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on 8 August 1975.

OPINIONS BELOW

The Court of Appeals rendered its opinion on 8 August 1975, and entered judgment on the same date. In this opinion the Court referred to its opinion in the case of United States v. Santibanez, which is dated 11 August 1975. Both of these opinions, which have not been officially reported as yet, are attached as Appendix A. A memorandum opinion (unpublished) written by the United States District Judge, the Honorable Reynaldo G. Garza, after the trial in this case is also appended hereto, together with Judge Garza's opinion in United States v. Fuentes, 379 F. Supp. 1145 (S.D. Texas, 1974), which Judge Garza attached to and incorporated by reference in his said memorandum opinion in Petitioner's case. Both of said opinions by Judge Garza are attached as Appendix B.

JURISDICTION

On 8 August 1975 the Court of Appeals entered judgment affirming the criminal conviction of Petitioner for transporting four illegal aliens by motor vehicle in violation of Title 8, United States Code, Section 1324(a)(2). (App. A) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly decide that the rights of Petitioner under the Fourth Amendment to the Constitution had not been violated when he was stopped without cause, suspicion or warrant at a permanent Border Patrol checkpoint between 65 and 90 miles from the border for the purpose of inspecting and questioning him and searching, at least visually, the lower interior of his vehicle?

2. Away from the border, do the same Fourth Amendment rules and guarantees apply to stops at Border Patrol checkpoints as apply to stops by roving patrols?

3. Do Fourth Amendment guarantees forbid the Border Patrol from making an investigative stop of every vehicle that travels through a permanent checkpoint located many miles from the border?

CONSTITUTIONAL PROVISION, STATUTE AND REGULATION INVOLVED

The Fourth Amendment to the Constitution of the United States is involved, which is as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Title 8, United States Code, Section 1357, (Section 287 of the Immigration and Nationality Act), is involved, which is in pertinent part as follows:

> "(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant---
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;"

* * *

"(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; and "

* * *

Title 8, Code of Federal Regulations, Section 287.1, is involved, which is in pertinent part as follows:

"(a) (1) External boundary. The term 'external boundary,' as used in section 287(a)(3) of the Act, means the land boundaries and the coast line of the United States, including the ports, harbors, bays and other enclosed arms of the sea along the coast, and a marginal belt of the sea extending three geographic miles from the outer limits of the land that encloses an arm of the sea.

(2) Reasonable distance. The term 'reasonable distance,' as used in section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned, any distance fixed pursuant to paragraph (b) of this section.

(b) Reasonable distance; fixing by district directors. In fixing distances not exceeding 100 air miles pursuant to paragraph (a) of this section, district directors shall take into consideration topography, confluence of arteries of transportation leading from external boundaries, density of population, possible inconvenience to the traveling public, types of conveyances used, and reliable information as to movements of persons effecting illegal entry into the United States: Provided, That whenever in the opinion of a district director a distance in his district of more than 100 air miles from any external boundary of the United States would because of unusual circumstances be reasonable, such district director shall forward a complete report with respect to the matter to the Commissioner, who may, if he determines that such action is justified, declare such distance to be reasonable."

* * *

STATEMENT OF THE CASE

In the early morning hours of April 28, 1974, Petitioner's car was routinely stopped by the Border Patrol at its permanent checkpoint on U. S. Highway 77 near Sarita, Texas. As the Border Patrol agent approached he could see no one in the vehicle except Petitioner; but when he got close enough to see the car's lower interior, he saw one man lying down on the front seat and three more lying down on the back seat. The Border Patrol agent would not have been able to discover these four individuals if he had not been able to get "right on" the stopped

vehicle to look down into its lower interior.

The investigating officer determined that the four persons he had discovered lying down in Petitioner's car were all illegal Mexican aliens, and the Petitioner and the four aliens were all arrested. These four aliens were subsequently convicted of being in the United States illegally, and after receiving suspended sentences on April 29, 1974, were held in jail by the Government as material witnesses until Petitioner's trial.

The Border Patrol checkpoint where Petitioner's car was stopped was a permanent checkpoint operated 24 hours a day. It was closed only when bad weather caused poor visibility on the highway. The checkpoint is between 65 and 90 miles from the Mexican border, and at the time in question all vehicles passing north through the checkpoint were checked by the Border Patrol. Appropriate traffic signals were set up to accomplish this. It was routine at this checkpoint for an officer to approach close enough to every stopped vehicle to enable him to visually inspect its interior, unless the officer recognized the occupants as local people who must go through the checkpoint almost daily.

U. S. Highway 77 runs from the Mexican border at Brownsville north into the interior. There are several fairly large cities, as well as a number of smaller communities, between the border and this checkpoint, and a substantial amount of traffic flows north through the checkpoint. The checkpoint has been situated at the same spot since August, 1973, but there was a moving checkpoint in this area for years prior to that time.

Before trial Petitioner filed a motion to suppress all the evidence obtained directly or indirectly by the Government when he was stopped at the checkpoint. The trial Court elected to "carry it along" and heard this motion with the jury trial on the merits. Despite Petitioner's objections, the Government called as witnesses at the trial the Border Patrol checkpoint agent and the four aliens. Petitioner's motion to suppress the evidence was overruled when the Government rested; it was renewed at the close of all testimony and was again overruled. The jury found Petitioner guilty on all four counts, and he was sentenced to imprisonment for terms of two years, but to serve six months with the remainder

suspended, and to probation. He was not imprisoned during his appeal to the Court of Appeals, and a motion has been filed asking the Court of Appeals to stay its mandate in this case pending this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

The establishment by the Border Patrol of highway checkpoints well away from the border which stop for investigation each and every vehicle traveling through them has raised serious Fourth Amendment problems. In the recent case of United States v. Ortiz, ___ U.S. ___ (June 30, 1975), this Court put to rest one of these problems by holding that an officer could not search the trunk of a vehicle stopped at a checkpoint without consent or probable cause. But the Ortiz opinion made it clear that this Court did not decide the question of whether Border Patrol officers may stop a motorist at a checkpoint to question him and to at least visually search the interior of his vehicle without warrant, cause or reason. This question is presented in Petitioner's case, and it is of such constitutional importance as to qualify for consideration and resolution by this Court.

United States v. Ortiz, supra, may have dealt a severe blow to the Border Patrol's operations at its highway checkpoints away from the border, and there seems little doubt that if Petitioner's contentions herein are sustained by this Court, then these permanent checkpoints will pass into well-deserved oblivion. At these checkpoints each and every vehicle is systematically stopped for investigation and perhaps interrogation of its occupants. The checkpoint officer looks over the occupants and usually at least inquires of their citizenship. He also visually searches the lower interior of the car. Whenever he deems it appropriate the checkpoint officer can make further inquiry testing an occupant's purported citizenship such as, "What is your name? Where do you live? Where were you born? Where are you going?" and a myriad of other verbal probes. The officer may ask the occupants for birth certificates or naturalization papers.

In United States v. Brignoni-Ponce, ___ U.S. ___ (June 30, 1975), this Court held that the Fourth Amendment does not allow a roving patrol of the Border Patrol to stop a vehicle away from the border in order to question its occupants

regarding their citizenship, if the patrol officers have no reason to make the stop except that the occupants appear to be of Mexican ancestry. The Court in this opinion said that the governmental intrusions which occur in such random stops demand that the officers be aware of specific facts that reasonably warrant suspicion that the vehicles contain illegal aliens. In so holding this Court reaffirmed the Fourth Amendment guarantee described in Carroll v. United States, 267 U.S. 132 (1925), as the right to free passage over public highways without interruption or search, unless there is some known and sufficient reason to interrupt such passage.

Petitioner recognizes that the Constitution protects his freedom and privacy only against unreasonable governmental intrusion and that there can be no ready test in determining if an intrusion is reasonable other than by balancing the need to intrude against the invasion which such intrusion entails. Camara v. Municipal Court, 387 U.S. 523 (1967). If this Court undertakes to balance Petitioner's right to privacy against the need for such checkpoints, it can be fairly assumed that the Government will advance the same contentions it advanced in the Ortiz and Brignoni-Ponce cases, supra. The opinions in these cases indicate that the Government will point to the 10 or 12 million aliens which it claims are now illegally in the country, 85% of which are from Mexico. Since most of these illegal aliens migrate into the interior of the country where employment opportunities are better than near the border, the Government will maintain that these checkpoints are the very backbone of the Border Patrol's apprehension operations and that to deprive the Patrol of the right to systematically stop all vehicles coming away from the Mexican border will cripple, if not indeed shatter, the entire system of alien control. It will also be emphasized that each stop constitutes only a minor and brief intrusion upon the privacy of the persons stopped, that usually it consists of no more than a visual inspection from the vehicle's window and a brief word, after which the travelers continue their way without fear or other ill effect.

Petitioner, in reply, would respectfully submit that the two million or so people living along the Mexican border have endured the checkpoints for m

years. If, despite the extended operations of these devices, there are still 10 or 12 million illegal aliens at large in our country, then a substantial doubt should arise about the efficiency and necessity of the checkpoints.

Probably it is correct that a checkpoint stop does not evoke the same degree of fear as does a stop by a roving patrol, but this does not mean that the former evokes no apprehension at all from honest citizens. Each vehicle passing through such a checkpoint is in effect taken into custody until the officer in charge determines that there is no cause for detention or a more extensive search. Even the innocent, and especially the uneducated innocent, can experience apprehension when coming under such official scrutiny. Then too, there is the apprehension which comes when a driver wonders if all the vehicles moving up from behind are going to stop before he can leave his semi-fixed position on a major highway. Assuming that the checkpoints are well marked with stop signs and signals, one wonders how many drunks have been unable to comprehend that one must stop in the middle of the King Ranch at night. Statistics on such accidents are no doubt hard to come by, but it seems fair to assume that serious accidents have or will occur at these traffic impediments.

It is also submitted that to the law-abiding populace of the Mexican border area the checkpoints are irritating, annoying and oppressive. The people in the interior of the country who harbor, or at least tolerate, the transient aliens are not saddled with these devices. Virtually everyone who has lived in the Lower Rio Grande Valley for any period of time has had to undergo this same procedure again and again. It is impossible to travel north from the Lower Rio Grande Valley by automobile without going through a checkpoint. Naturally, the resentment generated by this procedure is magnified by repeated exposures to it. Is it not specious to contend that the impact of one isolated checkpoint stop is of little consequence, when the same checkpoint must be faced time and again by the border-area residents? About the only options a border-area resident has to the checkpoint are to stay at home or to go by air. Certainly the total impact of millions of checkpoint intrusions each year should be considered in weighing the reasonableness of these operations.

Perhaps some--especially those whose ox is not being gored--question why a checkpoint would generate any ill feelings at all, and the answer is this: free people are instinctively repelled by any and all governmental regimentation; furthermore, the media of cinema and television have forged a firm link in the public mind between checkpoints and the totalitarian forms of government. (Who can recall a film set in the Nazi terror which did not involve at least one gripping trip through a German-manned checkpoint?)

In the Brignoni-Ponce opinion, supra, this Court indicated that Mexican ancestry is at least a relevant factor in forming a suspicion that a person may be an alien. It was also said that the Government had pointed out that "trained officers" can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut. What this really means is that most "wetbacks" have the dark hair, dark skin, and dark eyes of Mexicans (which they are), are poorly clothed, and are poorly groomed. Unfortunately, a substantial part of the citizens living in the border area have the same physical characteristics, as well as the same clothing and grooming problems. So it would appear that thousands of the poor who live along the border must approach these checkpoints with certain apparent and "suspicious" characteristics which, coupled with the customary old car or some other such innocent but "suspicious" accouterment, could earn them an unnecessary and unpleasant interlude of interrogation and search. Petitioner suggests that the bite of the checkpoints obviously is not equal for all the citizens that are forced to pass through them.

It should therefore be apparent that the traffic checkpoints create massive opportunities for discrimination and for abuse of police power. Petitioner would in this regard recall to this Court its words in McDonald v. United States, 335 U.S. 451 (1948):

> "The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted." (Pages 455, 456.)

In the instant case the Border Patrol was violating constitutional prohibitions by operating a traffic checkpoint which systematically stopped every passing vehicle for interrogation and inspection without cause, suspicion or warrant, and the Border Patrol agent was therefore engaged in the unlawful enforcement of the law when he discovered the aliens lying down in Petitioner's car. The agent should not have stopped the car so that he could get into the position where the discovery was made. Petitioner was a "fish" caught in the Border Patrol's unconstitutional "fishing expedition."

The traffic checkpoints located many miles within this country are scabs on the fair face of our free society and should therefore be held unconstitutional. This Court can and should act to correct this situation, and a grant of this petition for writ of certiorari will provide an opportunity to do so.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted in order to resolve the important Fourth Amendment questions raised by this case and in order to protect the Fourth Amendment rights of Petitioner which were violated by the Government on the occasion in question.

Respectfully submitted,

Dated: _____

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Court-Appointed Attorney
for Petitioner

Supreme Court, U. S.
FILED
DEC 23 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-5387

RODOLFO SIFUENTES,
Petitioner

—*v.*—

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 4, 1975
CERTIORARI GRANTED NOVEMBER 11, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5387

RODOLFO SIFUENTES,

Petitioner

—*v.*—

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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DOCKET ENTRIES

DATE	PROCEEDINGS
4/29/74	Complaint filed; Defendant informed of Complaint, right to counsel and all rights under Rule 5, U.S. Magistrate's Rules. Defendant waived counsel and preliminary hearing. Bond set at $5,000. Defendant committed to custody of U.S. Marshal.
5/1/74	10% deposit authorized by Judge Mallet.
5/1/74	Defendant released on a $500 deposit on his $5,000 bond. His address: 107 S. Liberty Ave., Weslaco, Texas 78596, Tel. No. 968-8430.
5/2/74	Deposit transmitted to Clerk in Houston, Texas.
5/6/74	Certificate of Grand Jury filed.
5/6/74	INDICTMENT FILED.
5/22/74	ORDER: appointing counsel Ballard Bennett, Signed WMM and filed.
5/24/74	Deft. appears W/mag. appt'd counsel, Ballard Bennett for ARR: caut. Waive formal arr: enter P/NG. set for trial: 6/3/74 at 9:30 A.M.
5/31/74	Defendant's Motion to Suppress Evidence, filed.
5/31/74	Defendant's Motion in Limine, filed.
5/31/74	Attorney Bennett appears deft. fails to appear for final pre-trial. Counsel apologizes to the Court. Counsel for deft. and govt. announce Ready for trial. Jury to be selected on June 3, 1974. Motion in Limine is overruled. Motion to suppress evidence will be carried along with the case.
6/3/74	Deft. appears for jury selection. Jury selected and instructed to return on June 10, 1974 @ 9:30 A.M. for trial of this case. Jury will be sworn on 6-10-74.

DATE	PROCEEDINGS

6/10/74 Deft. appears w/Glen A. Barnard for trial—jury heretofore selected on 6-3-74 is present. Jury is sworn—Deft. arr: P/NG to all counts Rule invoked by deft. Seven (7) witnesses sworn. Border Patrol Agent Colvin Moore is excused from the rule. Opening statement by the government @ 11:17 A.M. Opening statement by the defendant @ 11:17 A.M. Evidence begun @ 11:20 A.M. Govt's witnesses heard. Government rests—Deft. moves for instructed Verdict of Acquittal—overruled. Motion to Suppress is overruled. Trial not concluded Postponed till Tuesday June 11, 1974 @ 9:00 A.M.

6/11/74 Deft. appears w/counsel—Jury present—Trial resumed @ 9:00 A.M. Deft. witnesses heard. Cross examination @ 11:05 Deft. rests @ 11:35—Both sides close.

6/11/74 Deft. asks the Court to reconsider this Motion To Suppress the evidence overruled. Deft. moves for an instructed verdict of Acquittal—Overruled. Deft's requested charge filed. Government objects to Charge #5. Court to give general instructions on credibility of witness, Arguments of Counsel—Sandoval 1:45 P.M. Bennett 1:55 P.M. Sandoval 2:26 P.M. Charge of Court @ 2:35. Jury out @ 2:52—Verdict of Jury "Guilty" on Cts. 1, 2, 3, & 4. Deft. requests jury be polled Jury is polled and they all responded by saying "This is my Verdict" Verdict is received and ordered filed. P.S.I. ordered —To be sentenced on July 12, 1974 @ 9:30 A.M. Deft. continued on same bond.

7/12/74 Deft. appears W/appt'd counsel for sentencing on Cts. 1, 2, 3, and 4. Ct. 1; 2 yrs. impr. 6 mos to serve. Ct. 2: 2 yrs. impr. 6 mos to serve. Sentence to run concurrent—Total 6 mos. to serve. Ct. 3: 2 yrs. impr. Ct. 4: 2 yrs. impr. E.S.S. 3 yrs. Prob. W/super. cond. deft. submit to treatment on his drinking problems concurrent but consecutive to

DATE	PROCEEDINGS

sentence in Cts. 1 and 2 Deft. continued on original bond pending appeal.

7/13/74 Judgment and commitment, filed.

7/16/74 Deft's Notice of Appeal, filed.

8/2/74 Reporter's Transcript of Proceedings, filed.

8/2/74 Memorandum, Filed. Signed RGG and filed.

8/5/74 Mailed file to the U.S. Court of Appeal in N.O.

08/27/75 Judgment of Conviction appealed from is affirmed. From the 5th. Circuit Court of Appeal. Received original file.

09/08/75 ORDER: that appellant's application for bail pending the filing and disposition of a petition for writ of certiorari in the United States Supreme Court is Denied from the 5th. Circuit Court of Appeal, filed.

09/15/75 Record on appeal returned to Court of Appeals for certification to Supreme Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Cr. No. 74-B-102

[Filed May 6, 1974]

UNITED STATES OF AMERICA

vs.

RODOLFO SIFUENTES

INDICTMENT

THE GRAND JURY CHARGES:

COUNT 1

That on or about April 28, 1974, within the Brownsville Division of the Southern District of Texas, and within the jurisdiction of this Court, RODOLFO SIFUENTES, knowing that a certain alien named Rito Alvarez-Flores was then and there in the United States in violation of law and having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior to the aforesaid date, did transport and move said alien by means of a motor vehicle from near Progreso, Texas, to near Sarita, Texas, in violation of Section 1324(a)(2), Title 8, United States Code.

COUNT 2

That on or about April 28, 1974, within the Brownsville Division of the Southern District of Texas, and within the jurisdiction of this Court, RODOLFO SIFUENTES, knowing that a certain alien named Abel Barboza-Estrada was then and there in the United States in violation of law and having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior to the aforesaid

date, did transport and move said alien by means of a motor vehicle from near Progreso, Texas, to near Sarita, Texas, in violation of Section 1324(a)(2), Title 8, United States Code.

COUNT 3

That on or about April 28, 1974, within the Brownsville Division of the Southern District of Texas, and within the jurisdiction of this Court, RODOLFO SIFUENTES, knowing that a certain alien named Guadalupe Lerma-Avila was then and there in the United States in violation of law and having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior to the aforesaid date, did transport and move said alien by means of a motor vehicle from near Progreso, Texas, to near Sarita, Texas, in violation of Section 1324(a)(2), Title 8, United States Code.

COUNT 4

That on or about April 28, 1974, within the Brownsville Division of the Southern District of Texas, and within the jurisdiction of this Court, RODOLFO SIFUENTES, knowing that a certain alien named Armado Rojero-Ortiz was then and there in the United States in violation of law and having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior to the aforesaid date, did transport and move said alien by means of a motor vehicle from near Progreso, Texas, to near Sarita, Texas, in violation of Section 1324(a)(2), Title 8, United States Code.

A TRUE BILL:

/s/ [Illegible]
Foreman of the Grand Jury

ANTHONY J. P. FARRIS
UNITED STATES ATTORNEY

BY: /s/ Charles F. Sandoval
CHARLES F. SANDOVAL
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Criminal No. 74-B-102

UNITED STATES OF AMERICA

vs.

RODOLFO SIFUENTES

DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

To the Honorable Judge of said Court:

COMES NOW Rodolfo Sifuentes, the Defendant in the above entitled and numbered cause, and files this, Defendant's Motion to Suppress Evidence, and as grounds therefor respectfully shows the Court the following:

In the early hours of April 28, 1974, Defendant was driving his personal automobile from Weslaco, Texas, to Taft, Texas. He stopped near Raymondville, Texas, and was asked for a ride by four men who wanted to go in the direction of Corpus Christi, Texas, and who told Defendant their automobile had broken down. Defendant gave these four men a ride.

Defendant then proceeded north on U.S. Highway 77 until he was stopped at a Border Patrol checkpoint near the town of Sarita, Texas, which Border Patrol checkpoint was approximately 65 to 90 miles north of the Mexican border. All vehicles traveling north to the interior of Texas were being stopped at this checkpoint, and Defendant's automobile was stopped on a routine basis. Defendant was forced to stop at the checkpoint by a Border Patrol agent who then approached Defendant's automobile, looked in its window and observed Defendant and the four passengers therein. The Border Patrol agent questioned the Defendant and at least one of the passengers; whereupon he ordered the four passengers to get out of Defendant's car and took them a

short distance away where they were questioned at length. By this interrogation it was determined by the Border Patrol that these four passengers were apparently all aliens who were in the United States in violation of law.

Defendant says that this stopping of his automobile by the Border Patrol was an unlawful invasion of his right of privacy and the facts further constitute an unlawful search without warrant, probable cause or any other legal authority. In this regard Defendant would show that U.S. Highway 77, on which said Border Patrol checkpoint was situated, runs from the United States-Mexico border north to Kingsville, Victoria and beyond. There are a number of cities on Highway 77 between the Mexican border and the location of this checkpoint, including Raymondville, Harlingen, San Benito, and Brownsville, as well as several smaller communities. Also between the checkpoint and the border there are at least two entire counties—Willacy County and Cameron County.

Defendant says that on the aforesaid occasion all the evidence that he was transporting as passengers in his automobile four illegal aliens, Rito Alvarez-Flores, Abel Barboza-Estrada, Guadalupe Lerma-Avila and Armando Rojero-Ortiz, was obtained by the Border Patrol and government in violation of the laws and Constitution of the United States, and in particular the Fourth Amendment of the United States Constitution.

Wherefore, Defendant prays and moves the Court to suppress all of the evidence obtained by the government at the time of or as a result of stopping Defendant's automobile, including all testimony of each of the four said passengers in Defendant's automobile and of the Border Patrol agents working at said checkpoint, and any other evidence obtained as a direct or indirect result of stopping Defendant's automobile, and that the government, in prosecuting its case against Defendant herein, be prohibited and barred from calling as witnesses all and any of the said four passengers in Defendant's automobile and also the said Border Patrol agents working at the checkpoint, and from using or offering therein

any other such testimony or evidence obtained directly or indirectly by stopping Defendant's automobile at said checkpoint.

Respectfully submitted,

/s/ Ballard Bennett
BALLARD BENNETT
Court-Appointed Attorney for
Defendant, Rodolfo Sifuentes

[EXCERPTS FROM TRIAL TRANSCRIPT]

[2] PROCEEDINGS OF MAY 31, 1974

10:30 A.M.

THE COURT: Where is Rodolfo Sifuentes?

MR. BENNETT: Your Honor, I didn't realize that he had to be here this morning.

THE COURT: Yes, I wanted every defendant here.

MR. BENNETT: I asked you—

THE COURT: If there was any change in the plea, I want to know about it.

MR. BENNETT: Well, there is not, Your Honor.

THE COURT: Did you file a motion?

MR. BENNETT: Yes sir, I have. You remember I talked to you, we had a motion to suppress and you said you would carry it along, and I have filed it and I have a little order on the end of it that says that it will be heard at the time of trial if satisfactory with the Court, and I also have a short motion in Limine, Your Honor. I don't know whether—

THE COURT: Let's hear it now, let's hear it now.

MR. BENNETT: All right, sir. It is simply my defendant intends to take the stand and testify in this case, and it is simply to instruct the attorney for the United States prior to asking him about any previous [3] conviction to check with the Court outside the hearing of the jury.

THE COURT: What has he been convicted of?

MR. BENNETT: As I understand it, Your Honor, 10 years ago he was convicted in this Court, he pled guilty to and was convicted of soliciting and transporting aliens, in 1964, and he also has a DWI first, as I understand it.

THE COURT: That DWI first wouldn't be.

MR. BENNETT: Doesn't have moral turpitude, Your Honor.

THE COURT: But if a man has previously been convicted, although the general rule is that a conviction more than five years old or seven years old in this Federal Court might be too remote, but if it is a con-

viction directly bearing on the crime that he is being accused of, see, it can be used, and your motion as far as that conviction is concerned, your motion is overruled.

MR. BENNETT: All right, sir.

THE COURT: Yes, all right.

MR. BENNETT: I have an order that the Court can sign.

THE COURT: I don't have to sign any orders. Everything is of record here.

MR. BENNETT: All right.

[4] THE COURT: And the Clerk makes a notation on the docket.

Your motion in Limine as far as the conviction for transporting or soliciting aliens in the past is overruled.

MR. BENNETT: All right, sir.

THE COURT: Yes.

MR. BENNETT: Am I to understand then that the Court agrees that I can file this motion to suppress?

THE COURT: Oh, yes, and I am going to carry it along. I understand you are making it on the same grounds as Almeida-Sanchez.

MR. BENNETT: Yes sir.

THE COURT: Well, you may be right. The Ninth Circuit apparently went hog wild and said all checkpoints—can't stop them at checkpoints any more. I'm not agreeing with them and I think the Supreme Court is going to decide the issue finally, but I am telling you right now that if you are basing your motion to suppress on Almeida-Sanchez it will be promptly overruled by this Court until the Supreme Court tells me otherwise, see.

MR. BENNETT: I understand that, Your Honor, but I still feel like I have got to make it.

THE COURT: I know you have to make it. I [5] know you have to make it.

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[14] GUSTAVO DE LEON, called as a witness by the Government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SANDOVAL:

Q State your name, please.
A Gustavo De Leon.
Q What is your occupation, sir?
A I am a Border Patrol Agent.
Q How long have you been with the Border Patrol?
A Two years.

MR. BENNETT: Your Honor, may I remind the Court the defendant has a motion to suppress evidence.

THE COURT: Yes. Same ruling.

MR. BENNETT: And we would object to this man's testimony on the basis that it is results of a checkpoint and stopping and search which we say is illegal.

THE COURT: Your motion has been overruled, counsel.

MR. BENNETT: I understood the Court was carrying it along.

THE COURT: Yes, I am carrying it along with [15] the case but you don't have to object to everything.

MR. BENNETT: Well, fine, Your Honor. I just want to be sure that I don't waive anything for the defendant.

THE COURT: Yes, you are not waiving anything, counsel.

MR. BENNETT: It is my understanding then that I do not have to object any more to these questions?

THE COURT: No, you don't have to object any more to the testimony.

MR. BENNETT: Thank you, sir.

Q Mr. De Leon, I forgot how long you said you were with the Border Patrol.
A Two years.
Q Two years. Were you on duty on April 28th, 1974?
A Yes sir.
Q And what were your duties on that day?

A I was performing traffic control checkpoint duties for the Kingsville station at the checkpoint near Sarita.

Q Now, what highway is that on?

A U.S. 77.

Q And could you estimate how far it is from Brownsville?

[16] A It's approximately 90 miles.

Q About 90 miles north of Brownsville?

A Yes.

Q On Highway 77?

A On Highway 77.

Q Now, what do you do when you are working the checkpoint for the Border Patrol?

A We try to apprehend illegal aliens that are working their way into the interior of the United States, and apprehend smugglers that help them try to get to the interior of Mexico.

Q And how do you go about this by working the checkpoint?

A We stop every car that comes to the checkpoint unless we are satisfied that they are local people. We just, with a casual slowdown, we let them go on through after we have seen who is in the vehicles.

Q Now, is this Border Patrol checkpoint always operated?

A Yes sir, 24 hours a day unless due to manpower or weather would be the only time we are not set up.

Q And you have a sign or anything like that there to tell them to slow down?

A Yes sir. We have permanent state sign half a mile from the checkpoint south, warns people to slow [17] down. Approximately 260 yards from the checkpoint we have "stop ahead" sign. Then right at the checkpoint we have a "stop" sign, "U.S. officers."

Q Now, on this date, April 28, 1974, were your duties just routine on that date?

A Yes sir.

Q What time did you go on duty?

A I went on duty at 12:00 midnight.

Q And could you tell the court and the ladies and gentlemen of the jury what took place in the early morning hours?

A Okay. At about 3:00 A.M. we had this vehicle come around the corner which was approaching the first "slow down" sign at a pretty high rate of speed, and then slowed down until he came to the stop at the checkpoint. I was on the point at that time, and I approached the car and I could only see one person which was the driver.

I approached the car, and he hollered something like, "Hi, Champion."

And I said, "I'm not Champion," and said, "Immigration Inspection," and said, "are you a U.S. citizen?"

And he stated, "yes, I am, I'm from Weslaco."

About that time I saw a person laying in the front seat, and three more laying in the backseat pretending [18] to be asleep. I proceeded to try and wake the person in the front seat, and I could see one in the backseat was opening one eye and trying to keep the other one closed.

So I said, "okay, wake up, where are you all from?"

And, well, they said Mexico. So I took the aliens out of the car and told the driver to pull this vehicle to the secondary lane.

About that time the partners came out and took the aliens inside the van.

Q Now, who was driving the car?

A A person by the name of Rodolfo Sifuentes.

Q Do you see him here in the courtroom today?

A Yes sir.

Q Would you point him out, please.

A He is the gentleman in the brown suit.

MR. SANDOVAL: Please let the record reflect that this defendant or this—

THE COURT: Both of them have brown suits. Front one or back one?

A The one in the back with the wine tie.

THE COURT: All right.

MR. SANDOVAL: Please let the record reflect that this witness has identified the defendant.

MR. BENNETT: Not the ugly one.

[19] Q Now, you said that you established that these people were from Mexico. Did you ask them if they had papers?

A I asked them for their citizenship, and they said they were from Mexico.

Q Did you discover whether they had papers?

MR. BENNETT: Your Honor, I believe this is hearsay to this defendant.

THE COURT: Overruled.

You asked them that in front of this defendant?

A Yes sir.

THE COURT: Overruled.

Q My question, sir, is did you—

THE COURT: Determine that they didn't have any papers?

A Yes sir, I determined there was no papers, they didn't have no papers. They stated they were just citizens of Mexico. They didn't produce anything.

Q After this took place, did you read the defendant and these aliens their constitutional rights?

A Okay, we took the aliens inside the van and I walked to Sifuentes' car and my partner, one of my partners, walked there, too, and he was the one that read the rights to Mr. Sifuentes in my presence.

Q What is your partner's name?

[20] A Edward Jerusa.

THE COURT: Is he here with you today?

A Yes sir.

THE COURT: Mr. Jerusa?

A Yes sir.

THE COURT: Mr. Jerusa is out there. He was here, Counsel. You didn't put him under the rule.

MR. SANDOVAL: No, Your Honor, I don't plan to introduce any statements.

THE COURT: Don't intend to call him?

MR. SANDOVAL: Yes.

THE COURT: Make sure he observes the rule in case you call him later on.

MR. SANDOVAL: Yes, Your Honor, I will.

I will pass the witness.

—0—

CROSS EXAMINATION

BY MR. BENNETT:

Q Mr. De Leon, I believe you said this was a permanent border checkpoint, is that correct?

A Yes.

Q And it is operated 24 hours a day, weather permitting?

A Yes sir.

Q And, of course, the obvious reason for not [21] operating it on bad weather is if you stop the car on the highway there the visibility being bad you are liable to have very serious accident, is that it?

A Yes sir, to protect the public.

Q Would you say that this checkpoint was approximately 65 to 90 miles from the United States-Mexican Border?

A 90 miles, yes sir.

Q As the crow flies or the bird?

A No sir, air miles is approximately 86, I believe.

THE COURT: From Brownsville?

A From the border.

THE COURT: At the nearest point?

A Yes, from the—

THE COURT: I have figures, you know, that I have been supplied, and the Rio Grande, you know, curves up there. Unless you know—do you know exactly how many miles there are from the border to the checkpoint?

A No sir, exactly, no sir. I'm just estimating about 90 miles.

THE COURT: But that is from Brownsville you said?

A Yes sir.

THE COURT: Well, there is lots of border further [22] away from us that is closer to that spot?

A Right.

THE COURT: As I understand it, McAllen is closer to that checkpoint than Brownsville is.

A McAllen—

THE COURT: Edinburg, Weslaco?

A I guess Weslaco, Edinburg would be. I don't think —I'm not familiar with the valley area. I don't know how far.

THE COURT: Where are you from originally?

A Corpus.

THE COURT: Corpus Christi?

A Yes sir.

THE COURT: I think the map—if you are trying to make a point of where the checkpoint is from the border, the map will show. This court will take judicial notice—that is for the purpose of your motion?

MR. BENNETT: Yes sir. I have said it was 65 to 90 miles, and I think it is in that area.

THE COURT: Yes.

Q Would you agree it is between 65 to 90 miles to the nearest point on the border?

A Yes sir.

Q All right. Now, all vehicles traveling north [23] to the interior were being stopped at the time in question, is that right?

A Yes sir.

Q And that was just done on a routine basis? You want to look in each vehicle to see who is in there and what is happening, is that correct?

A Yes sir.

Q All right. You had, I believe you said, you had some lights flashing. How many sets of lights did you have at this checkpoint?

A Right at the checkpoint, okay, on the "stop ahead sign", which is approximately 260 yards from the checkpoint, it is a blinking light; amber blinking light. At the checkpoint we have a big red flashing "stop" light.

Q All right, sir. Does this "stop" light sit on the side of the road or in the road?

A It hooks onto the same "stop" sign that sits right in front of the van.

Q But that van is on the side so the light is over on the side of the road?

A Right.

Q Do you have anything in the middle of the road?

A Okay, in the middle of the road we have cones.

Q All right. And that is to keep the traffic that is going north over in the right lane and also to [24] keep the traffic coming south in the—

A Right, there is another sign north of us that says "no passing."

Q All right. And incidentally, you don't bother the traffic coming south routinely, do you?

A No sir.

Q You are just interested in the northbound traffic?

A Yes.

Q All right. Now, when you stopped this car that you have testified about, you could not see how many people were in it until you approached it, is that correct?

A Right.

Q There is some artifical lights there at this checkpoint, is it?

A Yes sir, in the back of the checkpoint we have two big lights.

Q And so when you walked up and looked into the car it was then that you could see these aliens?

A Yes sir.

Q And of course you testified you saw Mr. Sifuentes was driving?

A Yes sir.

Q And the initial questioning that you did, as I understand your testimony, you asked Mr. Sifuentes about [25] his citizenship and he responded in a satisfactory manner, and then while these four men were still in the car you questioned them about their citizenship?

A Yes.

Q Did you question just one first or did you ask the questions to them generally?

A I questioned the one in the front seat first and then my second question was to the three in the back.

Q And you did not receive a satisfactory response from any of these four, is that right?

A No sir.

Q So then you ordered them to get out of the car?

A Yes sir.

Q You took them a short distance away then and they underwent interrogation, is that correct?

A Yes—well, we put them inside the van which would be a short distance from the—

Q Did you take part in the interrogation?

A Part of it, yes sir.

Q And you had how many men working on this checkpoint or were working at the time?

A It is two officers assigned to the shift and then there was two more officers backing us up that were road officers.

[26] Q I see. Well, what do road officers do?

A They work the road south and north of us.

Q In other words, they are sort of mobile and they—

A Mobile observing traffic.

Q Yes, they are, I guess, to keep people from stopping down to the south and letting people out and walking around the checkpoint, is that correct?

A That, too; pickup hitchhikers.

Q All right. Now, you said that you learned that these aliens were illegal aliens. It was during this interrogation right after you stopped them at the checkpoint that you first learned of that, is that correct?

A Right away, yes sir.

Q You say this is on Highway 77 running north and south?

A North and south.

Q All right, sir. And that runs from the U.S.-Mexican border to Kingsville and Victoria and on beyond up into the interior of the state?

A Right, goes on.

Q All right. There are a number of cities on U.S. Highway 77 between the checkpoint and the Mexican border, including Raymondville, Harlingen, San Benito and Brownsville, is that correct?

[27] A Yes sir.

Q And these are fairly large, substantial cities, is that right?

A I believe so, yes sir.

Q And there are also several smaller communities in between like Lyford and so forth that is on U.S. Highway 77?

A Yes sir.

Q And in fact, Cameron and Willacy County is between the Mexican Border and this checkpoint? The entire counties lie between that?

A Yes sir.

Q Is there any substantial amount of traffic that flows north through this checkpoint on Highway 77?

A North, yes sir.

Q Yes sir. How was the traffic on the occasion in question? Was it fairly—

A It was medium.

Q What you usually would expect in the early morning hours on Sunday morning?

A Yes sir.

Q You said you worked an eight-hour shift?

A Eight-hour shift at the checkpoint, yes sir.

Q And I suppose whichever shift you are on depends on how much traffic?

[28] A Right.

Q The other two shifts, the one that would run from 8:00 to 4:00 and then from 4:00 to midnight are the ones where most of the traffic come through?

A Normally, yes sir.

Q And is Sunday a fairly heavy day usually for traffic?

A Pretty heavy, yes sir.

Q It is probably on just an ordinary week you would expect Sunday to be one of your heaviest days?

A Yes sir.

Q All right. It is a crime to cross the United States border illegally, is it not?

A Yes sir.

Q So what you found out from these gentlemen, if it were true, then that would make them criminals, is that right? These four aliens?

A Yes sir.

Q Did you charge them with illegal entry into the United States?

A Did we charge?

THE COURT: Were they charged with illegal entry?

A Yes sir.

Q And as far as you know that is still pending [29] against them?

A Yes sir.

THE COURT: Still pending or were they taken before the magistrate? Do you know? If you don't know something, don't be saying it. If you don't know, say, "I don't know."

A No, I don't know whether they were taken before the magistrate on that charge then.

THE COURT: Do you know if the charge is still pending?

A No sir, I don't know.

THE COURT: You don't know. Well, tell him you don't know.

The records of this court will show what happened to those people.

Q Did one of these four passengers have a letter or a piece of paper with an address on it from someone up in the United States?

A I don't remember.

Q Did you make a written statement concerning this incident?

A No sir, I didn't make the written statements. My partners did.

Q You didn't make it but your partners did? And it was concerning this incident that you were testifying [30] about, is that right?

A Yes sir.

Q Did you see the statement at the time it was made?

A Yes sir, I did.

Q And it was correct? The facts therein were correct as you knew them, is that right?

A Yes sir.

MR. BENNETT: Could I see the statement, Your Honor, at this time?

THE COURT: Yes. That is whose statement there?

MR. SANDOVAL: That is the statement of Edward Jerusa, Your Honor.

Your Honor, if I may clarify just for the Court, I'm sure that what he asked was A—was the ordinary form they make out. He did make a written memorandum.

I think he may have forgotten it, that you made a written memorandum.

THE WITNESS: Okay, that is a memorandum. I didn't take no statements. I made memorandum as to the facts to present to the chief. The facts as to whatever happened there that night, involved in this case.

THE COURT: You did write something?

A A memorandum, yes sir.

[31] THE COURT: When you say you hadn't made a statement you meant that you hadn't taken any statements from anybody?

A On statements under oath from the aliens, no sir, I didn't take one.

THE COURT: But did you make one, did you write something?

A I made a memorandum, yes sir.

THE COURT: That is what he is asking you for. Do you have that?

MR. BENNETT: He has given it to me.

MR. SANDOVAL: Your Honor, if I may—

THE COURT: Mark it Government Tender 1.

(Government's Tender Number 1 marked for identification.)

MR. SANDOVAL: Please let the record reflect that the Government is tendering to the defense what has been marked as Government's Tender Number 1, a one-page typed statement made by this witness.

Q. Did you say, sir, that one of these aliens did not have a letter or piece of paper on them?

A I said I don't remember.

MR. SANDOVAL: Your Honor, we are going to object to that. He said he didn't remember it.

Q Well, did you search the aliens?

[32] A Yes sir, we did.

Q What did they have on them?

A They just have their—I can't recall exactly what each one had. It was limited stuff. Few dollars or pesos and few other items. I can't recall exactly.

Q Did you make a list of what they had?

A No sir.

Q No list?
A No sir.
Q Well, it is fair to say then that they could have had a letter or an address?
A It could have, yes sir.
Q All right. Now, this permanent checkpoint that you were working at is the one near—the so-called Sarita checkpoint, it is on Highway 77 and this highway runs essentially at that area from Raymondville to Kingsville, is that right?
A Yes sir.
Q Now, the border patrol has another permanent checkpoint on U.S. Highway 281, does it not? Between Falfurrias and Edinburg somewhere?
A Yes sir.
Q And does it have a permanent checkpoint, one that operates 24 hours a day, on the highway to Hebronville going out of Edinburg and up through there?
[33] A They have another checkpoint around that area. I don't know whether it is called a permanent checkpoint or it is there 24 hours. I don't know, sir.
Q You just don't know what the operation is on that?
A I don't know, right.
Q All right, sir. Now, you said I believe that when you looked into the car these aliens were lying down, is that right?
A Yes sir.
Q How could that man on the front seat have been lying down?
A He was lying down with his head towards the driver.
Q Well, did he have his feet up on the seat?
A No sir, his feet were under the dashboard.
Q Where was his head?
A His head was right next to the driver.
Q What about the three in the back? How were they lying down?
A They were all scooted down in the seat as far as they could go.
Q They were still sitting in the seat, is that right?
A Well, if you call it sitting, I guess so.
[34] Q Well, when you say lying you mean they were in a sitting position, they simply had their heads back, is

that right, or were they on the floor or on the seat stretched out?
A Okay, the one behind the driver was scooted all the way down, kind of putting his head all the way down in the corner. The other one was almost behind him and all sliding all the way down with his feet on the floorboard but lying to one side. And the one on this side was kind of towards the—on my side—but scooted all the way down in the seat.
Q So I believe what you are telling me is that they all had their feet on the floor and their rear ends in the seat? Is that a fair statement?
A More or less, yes sir.
Q And their heads were lying in various positions up against the back, is that correct?
A Yes.
THE COURT: But trying to hide from the view of the window? Is that what you are trying to tell us?
A Yes sir, down from the window.
THE COURT: If you had been standing there and had recognized this man as being a citizen, had been there before, crossed many times, you could have not seen anybody else or could have waved him on?
[35] A I could have waved him on and I never would have known anybody else in the car.
THE COURT: Because you couldn't see it?
A Yes sir.
THE COURT: Unless you got right on it?
A Yes sir.
THE COURT: In other words, what you are telling is they were scooted down so they would be down below the window level of the car?
A Where they could be seen from the outside, yes.
THE COURT: Okay. And there is a Roberto Champion that works that checkpoint? There is a Roberto Champion that works that checkpoint?
A Yes sir.
THE COURT: He is a U.S. Border Patrolman?
A Right, yes sir.
Q Well, I must have misunderstood you then because I thought you said that man in the front seat was sitting

and had his head over on the seat by the driver—I mean on the back of the seat by the driver.

A Okay, the man in the front seat was—okay, from his waist down he was laying this way, down, and his feet were sideways but down on the floorboard.

Q Well, I thought you said his head was up leaning [36] against the back of the seat?

A Not on the man on the front seat, no sir.

Q Well, how was he again?

A Okay, the man in the front seat; here is the driver, here is the man, he was laying this way with his feet this way. In other words, he was laying—from the waist down he was all the way down on the seat. His face was right next to the driver and his feet were down on the floorboard sideways.

Q So his head then was on the seat that he was sitting on?

A Okay, his head would be on the seat, right.

Q And how close did you have to get to the automobile and all to see this?

A Right up to the door.

Q And you did go right up to the door?

A I did, yes sir.

THE COURT: And before you got to the door this man yelled out and said, "Hello, Champion"?

A Yes sir. When I started walking out of the van, he hollered at me, "Hello, Champion."

MR. BENNETT: Pass the witness, Your Honor.

THE COURT: You say this road makes a curve there. You said came around the corner. You mean came around the curve?

[37] A Or I meant a curve. Right before you get to the checkpoint you come over a hill and then—small hill—then you come around a curve where there is a park on the left-hand side.

Q And you all can see the headlights of a car approaching?

A Yes sir.

Q And you said he was coming at a pretty fast clip but he slowed down?

A He slowed down pretty fast. Like somebody surprised to see something there.

Q How long had this checkpoint been there at that spot permanently?

A Permanent, more or less since August of last year.

THE COURT: It has been there for years?

A Yes sir, it has been there for years.

THE COURT: What is your definition of permanent?

A Permanent, a checkpoint that don't move from the same fixed location unless, like I said, weather permits that we shouldn't be there.

THE COURT: Because I have been going north of here for a long time and I have been going through checkpoints longer than last year, last August, I guarantee you, so that has been there a long time, hasn't it?

[38] A Oh, yes sir.

THE COURT: Yes.

Q How far was this car when you first saw it? Do you have any idea?

A Well, coming right around the curve, the "slow" sign is about half a mile, approximately half a mile from the checkpoint, so that is about how far he was.

Q And you say he was going at a fast clip? You estimated his speed by looking at him at night?

A Judged speed by approaching of the lights. The sound of the motor and the approaching of the lights.

Q Well, aren't most cars going a fast rate of speed back a half a mile away from the checkpoint?

A Half a mile away from the checkpoint going which way?

Q Yes. I say aren't they most of the time going at a fast rate of speed?

A When they traveling south, they slow down when they come to the first "stop" sign. Going to the first checkpoint they normally go by real slow. Coming from the other direction, some approach the checkpoint pretty fast, some approach the checkpoint slower than others.

Q So it is not unusual for a car to come at this [39] spot that you say he was going pretty fast, it is not unusual for a car to be going pretty fast, is that right?

A No sir.

Q Now, when you have these cars slow down you go up and look in them, don't you?

A Yes, I do.

Q On a routine basis?
A Right.
Q And this is something that you just didn't happen to do with Mr. Sifuentes? This is something that you do? If I went through there or Mr. Sandoval goes through there or anybody, you don't just stand off from the car 10 feet away and say, "go on by"?
A If I know the person, like I said, local residents or people that go through that checkpoint more than once, every other day, I just motion them to go ahead from where I stand.
Q All right. Except for people that you can recognize, and there is bound to be a lot of local traffic through there, you get to see people coming through again, they go to the store and they come back from the store and all that?
A Local people, yes.
Q But aside from that, if it is somebody that you do not know, then you go up to the car, don't you?
[40] A Yes sir.
Q And therefore you would be able to see in the car?
A When I approach it?
Q Yes, and that is why you go up there, isn't it?
A Yes.
MR. BENNETT: I will pass the witness.

—0—

REDIRECT EXAMINATION

BY MR. SANDOVAL:

Q Do you know Champion?
A Yes, I do.
Q Does he look like you?
A No sir.
Q Now, you wear a name tag, don't you?
A Yes sir.
Q Was it light enough that night to see your name tag?
A It should be, yes sir. Name tages are big enough.

Q Okay. Have you asked Champion if you knew this man?
A Yes sir, I had a conversation with Champion the following day and told him—
[41] MR BENNETT: Your Honor, that is clearly hearsay.
THE COURT: Don't say what—if Champion wants to come he can come testify.
Q Now, just to make this point clear, sir, do you know whether anybody else found any letter on any aliens?
A I don't recall, no sir.
Q Now, in years past there have been checkpoints operated south of this checkpoint that you were working that night, is that correct?
A Yes sir.
Q Do you know was there one specifically at a place called Turcotte?
A Yes sir, that's Checkpoint Number Three.
MR. SANDOVAL: Pass the witness.
MR. BENNETT: I have no further questions, Your Honor.
THE COURT: Now what you are talking about Checkpoint Number Three and all that is used to be sometimes checkpoint was at this point, then maybe two or three miles further south and then couple further south and you would move them around so that people wouldn't know exactly where you all were going to be?
A Yes sir, that's what I meant.
[42] THE COURT: And now you are staying at the same point all the time?
A Since August of last year, what we call a permanent checkpoint.
THE COURT: You stay at the same point, don't move up north or south?
A No sir, don't move around.
THE COURT: That is what you mean by permanent?
A Right.
THE COURT: But that doesn't mean that the same kind of a stop wasn't there before August?
A Right.

THE COURT: It was there?
A It has been there all the time.
THE COURT: But it could have been at one of three different places?
A Right.
THE COURT: All right, step down.

(Witness excused)

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[128] THE COURT: All right, since this question of these people, how long have you been detained, and all, the records of this Court show that on April 29th a complaint was filed against each one of these four aliens involved in this case by Border Patrol Agent Colvin C. Moore sitting next to Mr. Sandoval there. They were brought to the United States Magistrate William Mallett on the 29th, and on that date they all pled guilty to being in this country illegally, and he sentenced them to 90 days suspended for five years on condition of no unlawful return to this country. On the same day Mr. Moore appeared before the Magistrate and filed an affidavit saying that there was a case pending against Rodolfo Sifuentes for transporting the same aliens, and he requested that they be held under an affidavit, requested that the Magistrate hold them here as material witnesses, and the Magistrate did sign an order holding these people as material witnesses here. That is what [129] the records show. All this happened on April 29th, and they have been held in jail ever since awaiting the trial of this man.

(Witness excused)

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[148] THE COURT: All right, the Government has rested. Any motions by the defendant?
MR. BENNETT: Yes, Your Honor. Just a minute. Let me get my notes.
The defendant would like to move for a judgment [147] of acquittal on the grounds that the evidence is insufficient to sustain a verdict of guilty on any and all the counts.

THE COURT: Completely meritless. Your motion is overruled. Completely meritless.
MR. BENNETT: I would like to move for the production of any evidence or other information that is favorable to the accused.
THE COURT: Yes, if you have anything that is favorable to the defendant.
MR. SANDOVAL: No, Your Honor.
MR. BENNETT: Nothing at all?
That is all of the motions.
THE COURT: Any other motion? All right.
MR. BENNETT: Except this—of course, we have this motion to suppress evidence.
THE COURT: Which is overruled. I have heard the evidence now. Overruled completely. I am not carrying it along with the case any more. Overruled, and I will write on it. I will write on it. If the man gets convicted, I will write on that motion.
MR. BENNETT: All right.
THE COURT: If the Supreme Court in the United States in Almeida-Sanchez intended to do away with all the checkpoints—I'm sure that is not what they intended [148] in the first place—but I am writing on it. I am writing an opinion right now that I will cite in this case if necessary.

• • • •

[249] BY MR. BENNETT:

Q Did the aliens see you again after you were arrested there at the checkpoint? These four passengers.
A Well, yes sir, because the officer had me drive him and these people in my car to Kingsville Jail, so I drove my car and I drove them and the officer with me.
Q All right. Then how long did you stay in the Kingsville Jail?
A I stayed until Monday afternoon.

• • • •

[258] MR. BENNETT: Defense rests, Your Honor.
THE COURT: Any rebuttal?
MR. SANDOVAL: Government closes.
THE COURT: You close?

MR. SANDOVAL: Yes, Your Honor.
THE COURT: You close?
MR. BENNETT: Yes, Your Honor.
THE COURT: All right, members of the jury, will you go out in the hall with the marshal, please?

(Jury absent)

THE COURT: I will hear from you now.
MR. BENNETT: Your Honor, at this time I again would like to renew our motion to suppress this evidence that Your Honor—
THE COURT: That one has already been overruled.
[259] MR. BENNETT: I just thought I would ask you to reconsider it.
THE COURT: I am overruling it again.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Criminal No. 74-B-102

UNITED STATES OF AMERICA

v.

RODOLFO SIFUENTES

Honorable Anthony J. P. Farris, United States Attorney, of Houston, Texas, and Charles F. Sandoval, Assistant United States Attorney, Brownsville, Texas; for the Government.

Ballard Bennett of Weslaco, Texas; for the Defendant.

(Filed August 2, 1974)

MEMORANDUM

The Defendant Rodolfo Sifuentes stands charged by grand jury indictment of four counts or transporting certain aliens within the United States in violation of 8 U.S.C. 1324(a)(2). To these charges the Defendant has entered a plea of not guilty and has filed a Motion to Suppress.

By prior agreement of counsel the Motion to Suppress was carried along with the jury trial of the case. On June 10, 1974, the jury trial began and by that afternoon the government rested. At that time this Court overruled the Defendant's Motion to Suppress. The government's evidence relevant to the Defendant's motion was given from the stand by Agent Gustavo DeLeon of the Border Patrol. Agent DeLeon's testimony was that on April 28, 1974, he and Agent Edward Gerusa were manning the Border Patrol checkpoint near Sarita, Texas. The Sarita checkpoint is a strategically located checkpoint about 65 miles north of the Mexican border on U.S. Highway 77.

All vehicles traveling north out of the Valley on that road were being stopped at that checkpoint for a routine

immigration check. Around 3:00 a.m. the checkpoint was approached by a car driven by the Defendant. As Agent Gerusa was questioning the driver about his citizenship Agent DeLeon noticed that four other persons were also in the car and were slumped down in their seats as if they were asleep. On waking up these four passengers the agents found out that the four passengers were illegal aliens from Mexico. The Defendant was at that time arrested and taken into custody.

By way of his motion the Defendant contends that this stopping of his automobile by the Border Patrol was an unlawful invasion of his right to privacy and constituted an unlawful search without warrant or probable cause contrary to the rights guaranteed by the Fourth Amendment. At the basis of these allegations is the bottom line contention that the recent case of *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), prohibits the Border Patrol from operating checkpoints out on the highway away from the border. This Court has considered this same question on many prior occasions and has recently written extensively on it in *United States* v. *Fuentes*, — F.Supp.——, Cr. No. 74 B 69, decided on June 13, 1974 (S.D.Tex.1974) a copy of which is attached and herein incorporated for all purposes. For the reasons set out in *United States* v. *Fuentes*, *supra*, the Motion to Suppress is denied.

The Clerk will send copies of this Memorandum to the Defendant and his counsel and to the United States Attorney.

Done at Brownsville, Texas this 2nd day of August 1974.

REYNALDO G. GARZA
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA

v.

RODOLFO TRINIDAD FUENTES

Criminal No. 74-B-69

Honorable Anthony J. P. Farris, United States Attorney, of Houston, Texas, and Charles F. Sandoval, Assistant United States Attorney, of Brownsville, Texas; for the Government.

Knox Jones of McAllen, Texas; for the Defendant.

(Filed June 13, 1974)

MEMORANDUM AND ORDER

The Defendant Rodolfo Trinidad Fuentes is charged by Grand Jury indictment of possessing approximately 660 pounds of marihuana, with intent to distribute, in violation of 21 U.S.C. 841(a)(1). To this charge, he has entered a plea of not guilty and has filed a Motion to Suppress.

On May 10, 1974, a hearing was held on Defendant Fuentes' motion. The government called two witnesses, Max W. Ramee, the Assistant Chief of the U. S. Border Patrol Station at McAllen, Texas, and R. D. Kieffe, the U. S. Border Patrolman who made the checkpoint search and arrest. The Defendant did not call any witnesses and rested following the close of the government's evidence.

Apparently there is a feeling by the Border Patrol that their operations of checkpoint searches will soon be significantly effected by the expansion of the landmark holding of *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), by the Fifth and Ninth Circuits. This feeling is well founded in light of the recent Fifth Circuit case of *United States* v. *Speed and Rainer*, —— F.2d —— (5th

Cir., December 28, 1973, No. 73-2035), and *United States* v. *Bowen*, —— F.2d —— (9th Cir., May 9, 1974, No. 72-1012); *United States* v. *Peltier*, —— F.2d —— (9th Cir., May 9, 1974, No. 73-2509). In anticipation of this oncoming assault, the government elicited extensive testimony from Assistant Chief Ramee, who did not participate in the arrest, on the nature and scope of the La Gloria checkpoint in question. He testified that the Border Patrol operates a border patrol checkpoint on FM 1017, nine miles northwest of La Gloria, Texas. This checkpoint is approximately 32 miles from the United States-Mexican border and is in an area and along a route commonly used for the smuggling of aliens and contraband into the interior of the country. Toward the south, FM 1017 connects with at least three other roads that run directly to the Rio Grande River: FM 755, FM 681 and U.S. 281. A quick reference to a map shows that the other two principal checkpoints in this area, Falfurrias and Sarita, are similarly located in strategic positions, and the reasoning advanced in this Memorandum underpinning the legality of the La Gloria checkpoint can also be applied to the Falfurrias and Sarita checkpoints.

Assistant Chief Ramee testified that the checkpoint is normally manned for one eight-hour shift a day, but that it cannot be manned around the clock because of manpower shortages and weather conditions. He also stated that it is the policy of the Border Patrol Agency to stop everyone travelling out of the Valley who passes by this checkpoint to make an immigration check.

Under a rather extensive cross examination, Assistant Chief Ramee stated that he did not know if anglos passing through this checkpoint to the north were simply "waved on" after a cursory glance by the operating agent and re-emphasized that the policy was to stop everyone. It was also brought out on cross examination that the checkpoint is not always in the same location. It is moved up and down the same stretch of highway and, hence may be found on different locations on different days, but always in the same area.

Border Patrolman R. D. Kieffe testified that on February 13, 1974, at 8:15 in the evening, he was manning the checkpoint when he was approached by a 1970 Chrysler driven by the Defendant Fuentes, who was accompanied by his son, Ramiro Fuentes. As the car rolled to a stop, he noticed that it was riding low in the back; while talking to the occupants of the car and visually inspecting the interior, he detected the scent of marihuana about the car, an odor that he had smelled on many prior occasions. Agent Kieffe then requested the driver to open the trunk of the car, but the driver stated that he did not have the key. Agent Kieffe noticed that the key to the trunk was with the ignition key. On checking in the trunk, Agent Kieffe found, in plain view, 660 pounds of marihuana in brick form.

The Defendant has urged upon this Court the position that this warrantless search does not qualify as a border search under the holding of *Almeida-Sanchez*, *supra*, and, therefore, must be judged under the standards of probable cause. He further contends that there was no probable cause for this search and that the search and seizure is, therefore, in violation of his Fourth Amendment rights. In addition to the case of *Almeida-Sanchez* v. *United States*, *supra*, he has cited to the Court the recent Fifth Circuit cases of *United States* v. *Richard Glynn Byrd*, 483 F.2d 1196 (C.A. 5, 1973); *United States* v. *Speed and Rainer*, *supra;* and *United States* v. *Lonabaugh*, — F.2d — (5th Cir., December 17, 1973, No. 73-2241). Finally, he has cited to the Court the recent Ninth Circuit *en banc* decision of *United States* v. *Bowen*, *supra*.

From the onset, this Court wishes to make clear that it is proceeding on the theory that the initial stop was made for the purpose of visually inspecting the passenger section of the car and ascertaining the citizenship of the occupants, pursuant to 8 U.S.C. 1357. Thus, this Court must pass on the legality under the Fourth Amendment of not one, but two searches: the initial inspection and the subsequent search of the trunk. It is the opinion of this Court that the first search, the inspection, was legal, as the checkpoint was, in fact, the functional equivalent of the border, and it was reasonable to stop cars passing

the checkpoint to inspect the citizenship of all passersby and search for aliens. Consequently, the second search—the opening of the trunk—was also legal, as it was based on probable cause derived from the first search and was attended by exigent circumstances.

As was pointed out in the *Almeida-Sanchez* decision, border searches may be carried out many miles from the border if they are conducted at a point that would qualify as a functional equivalent of a border. The Court, by way of illustration, specifically mentioned "searches at an established station near the border at a point marking the confluence of two or more roads that extend from the border might be functional equivalents of border searches". *Almeida-Sanchez* v. *United States*, *supra*, at 272, 273. In the wake of *Almeida-Sanchez*, a significant question has been raised over what is and what is not an "established", "fixed" or "permanent" checkpoint. It is the feeling of this Court that the use of words "established" and "fixed", with reference to checkpoints, was nothing more than a reaction to the capricious and whimsical search that was before that Court. These words do not refer, as it may seem, to the character of the highway location where the search is carried out, but rather to the manner in which it is carried out. This Court simply cannot believe that the Supreme Court of the United States meant to say that the Fourth Amendment rights here involved rise and fall with the presence or absence of "permanent" electrical outlets, large steel signs and concrete buildings. What the Supreme Court found offensive was the arbitrariness of the search that was directed against the Defendant Almeida-Sanchez. This arbitrariness is overcome by a search that is directed at everyone passing a particular point. It is the understanding of this Court that phrases in *Almeida-Sanchez*, such as "established" and "fixed", are references to checkpoints which are carried out in the same general area of a highway and which are directed at everyone passing that point toward the interior of the country. It is the spirit of this understanding that brings the La Gloria checkpoint within the notion of the type of functional border equivalent suggested by *Almeida-Sanchez*: an "established station near the border at a point marking the confluence of two or more roads that extend from the border". Since the La Gloria checkpoint was the functional equivalent of the border, Agent Kieffe had the right to make the initial stop and inspection, just as if he were at the border itself.

There is an additional reason why this checkpoint should be considered a functional equivalent. By virtue of handling the Brownsville Division of the Southern District of Texas for over thirteen years and having lived in the Rio Grande Valley all my life, I have become intimately acquainted with immigration methods and problems peculiar to border areas. This Court wishes to explain more fully some of these problems and methods, for this Court is convinced that a more complete comprehension of them is necessary to understand why the La Gloria checkpoint and those similarly situated are border equivalents and why searches carried out at such operations are reasonable.

There are three types of aliens passing through the Rio Grande Valley. The first class consists of legal entrants who have permission to travel throughout the country for extended periods of time. The second class is formed by legal entrants whose length of stay and geographic range are quite restricted. This class is principally made up of Mexican citizens who carry I-186 border crossing cards, which allow the bearer to visit any place lying within an imaginary zone which extends twenty-five miles from the border, for up to seventy-two hours. The third class consists of the legendary *mojados*, who literally swim the river, often under the cover of night.

At the request of this Court, the Immigration and Naturalization Service has provided this Court with two affidavits concerning the use and misuse of the I-186 cards, copies of which are attached and are herein incorporated for all purposes. They will be referred to by reference to the office from which they were issued, McAllen and San Antonio. As reflected in the McAllen affidavit, it is a common practice for aliens to use the I-186 cards to legally cross the river at one of the seven international bridges located in the Brownsville Division, and thereafter

try to immigrate beyond the twenty-five mile zone into the interior of the country. At the La Gloria checkpoint (referred to as "Rio Grande City" in the affidavit), there were 116 apprehensions of aliens carrying I-186 cards, who were trying to infiltrate to the interior of the country in fiscal 1973, and almost 600 apprehensions at all three Valley checkpoints. Significant as they are, these figures only scratch the surface of the problem. This Court wishes to take judicial notice of the fact that it is also common practice for Mexican aliens to mail the card back to Mexico, before attempting to proceed to the interior, to avoid the confiscation of the card in the event that the alien is caught. Hence, many of the 2,472 aliens apprehended at the traffic checkpoints in the Valley who did not have the I-186 cards on them, no doubt used the cards to gain initial entry into the twenty-five mile zone. Many of the I-186 aliens come to the United States to avail themselves of the merchant stores in the Valley, and these people form an important segment of the retail economy. But there are a significant number, at least 600 and perhaps as high as 3,063 a year, who use these cards to cross the broder with the idea of heading north to enter the American labor market and, thereafter, are caught at the traffic checkpoints. To those that would vanish into the latin communities in the north, the La Gloria checkpoint is really a "second river", where they must present additional documents to gain unrestricted entrance to the interior of the country.

One might argue that the potential problem is not as large as this Court suggests, as the McAllen affidavit figures show less than 600 checkpoint apprehensions of I-186 aliens. Such reasoning simply misses the point. As indicated above, 600 is a low figure because of the mail-back technique. Furthermore, it is the existence of the checkpoints that keeps the flow at a manageable level. The intense pressure to immigrate is reflected by the Ninth Circuit in *United States* v. *Bowen*, *supra*, where the *en banc* panel estimated that there are presently somewhere between 650,000 and 850,000 illegal Mexican aliens in the country. *United States* v. *Bowen*, *supra*, at 21. But behind these people who have illegally, but successfully, penetrated our interior, stand millions whose movements must be regulated if we are to keep any sort of rein on the problem. As reflected by the San Antonio affidavit, there were 19,023,908 non-immigrant crossings at the seven international bridges located in the Brownsville Division. A non-immigrant alien is one who is a citizen of another country who crosses the bridge for purposes other than immigrating to the United States. Of this figure, ninety-one (91%) per cent, or approximately 17,300,000 aliens, gained entrance to the twenty-five mile zone by use of the alien crossing card and could not legally travel out of the zone.

Along the same line of reasoning, it is easy to see that, with regard to those who swim the river and then try to make their way north on public conveyance or by resorting to smugglers, the checkpoint is the first time that they come under the scrutiny of the Immigration and Naturalization Service, and in a real sense the checkpoint, because of its strategic location, serves the same function as the several international bridges that span the Rio Grande.

Considering all of the above, it is clear to this Court that the La Gloria checkpoint is a functional equivalent from two points of view. Under the *Almeida-Sanchez* rationale, as understood by this Court, it is a permanent checkpoint, in that it is strategically located, non-roving and is directed at everyone who passes through it. In addition, under the "second river" theory, the checkpoint is a necessary barrier to which all passing through must present themselves and must prove, on request, their right to travel beyond the twenty-five mile zone into the interior.

This Court is cognizant of the fact that reasonableness is the guiding principle of warrantless searches carried out under the Fourth Amendment, and that in determining reasonableness, the needs of society must be balanced with the rights of individuals vital to our concept of liberty. When a United States citizen presents himself to one of the international bridges and is allowed to enter the country, he has the right to travel anywhere he chooses. However, it does not appear to be widely held

knowledge among either the citizenry or the judiciary that the American crossing the river steps into a zone to which are also admitted tens of thousands of aliens daily who, unlike their American counterparts, do not have the same right to travel anywhere in our nation and must remain inside the twenty-five mile zone. The only way to ferret out those that have the right to travel out of the zone from those that must remain within the zone is to check everyone soon after they have left the zone. Viewed in this posture, the checkpoints bear a rational relationship to a legitimate governmental interest. Of course Congress could do away with the I-186 border passes, but to do so would surely create a sore in American-Mexican relations, as well as wreak havoc on our local economy, and the country would still be faced with the problems of those who swim the Rio Grande to gain entry into the United States. Balancing the very minor intrusion into our Fourth Amendment freedoms with the all but impossible task that would be placed on the Immigration and Naturalization Service by checkpointless regulation of the flow of aliens, I find that these checkpoints are not an affront to the reasonableness requirement of the Fourth Amendment; to the contrary, they are the very voice of reason. If the Immigration and Naturalization Service is to be deprived of this tool of law enforcement, then we had better be prepared to spend tens of millions of dollars annually to assure that those who are prone to violate our immigration laws are caught at the river's edge when they land. This Court cannot believe that this was the intended holding of *Almeida-Sanchez* v. *United States.*

Counsel has cited to the Court the case of *United States* v. *Speed and Rainer, supra,* wherein the Fifth Circuit reversed a conviction based on evidence obtained from the Falfurias checkpoint. The District Court in that case characterized the checkpoint as "non-permanent", and the Fifth Circuit panel seized upon the characterization to reverse the District Court with the following language:

> "*Almeida-Sanchez*, if it has not answered all the questions about this area of the law, has at least given new focus to the inquiries. We must now ask if a search occurred either at the border or at the

functional equivalent thereof. 37 L.Ed.2d at 602. If not, then it is not a border search . . ."

"Proximity to the border is not enough. The searching officer must know or have reasonable suspicion that the inidividual or thing searched has just crossed the border." (Quoting from *United States* v. *Lonabaugh, supra.*)

"In *Almeida-Sanchez*, a roving border patrol searched a car on an east-west highway about 25 miles from the border. In this case, we have a temporary checkpoint located on a north-south highway between 65 and 75 miles from the border. Neither search was at the border or its functional equivalent . . ."

"The distinction between a checkpoint and a roving patrol is not important. There appears to be little difference between the interference with domestic traffic caused by patrols and that caused by temporary checkpoints which may be moved about at the whim of the agents who operate them."

"Thus, what occurred in this case is essentially identical to the searches in *Almeida-Sanchez* and *Byrd*. The only connection to the border which could justify any of the searches was that they fell within the ambit of 8 U.S.C. § 1357(a) and C.F.R. § 287.1, and that similar searches in the area had produced evidence of illegal activity. Neither a Congressional statute nor praise for the results of a certain investigative technique can justify an otherwise illegal search and seizure. The convictions of both appellants are

REVERSED."

A reading of the District Court's opinion, *United States* v. *Speed and Rainer*, written by the Honorable Owen D. Cox of the Corpus Christi Division of our Court, Cr. No. 72-C-70, shows that the checkpoint was non-permanent, in that it was not manned at all hours of the day and was shifted up and down the same general stretch of the highway, in order that its effectiveness in detecting illegal aliens not be diminished. Though its exact location might be called "whimsical", in that it was not always the same

number of miles from the border, there is no finding one way or the other by the District Court, or comment by the Fifth Circuit that it was whimsical in the sense that it stopped travellers in an arbitrary fashion and did not stop everyone. It is this type of whim that *Almeida-Sanchez* condemned.

This Court, therefore, finds that the case of *United States* v. *Speed and Rainer, supra*, is not controlling for two reasons: first, the *Speed, Rainer* decision limits its consideration of "whim" to the geographical sense and does not address the question of whim with respect to those searched; and second, the decision deals with a checkpoint which the Court found to be a non-border equivalent, whereas, in the case before this Court, the checkpoint involved is a border equivalent within the meaning of *Almeida-Sanchez*.

It should be further noted that there is considerable doubt in the mind of this Court as to whether *Almeida-Sanchez*, which is the basis of *Speed, Rainer*, can in fact be relied upon in overturning a conviction based on a checkpoint classed as "temporary" in the geographic sense. It may be significant to note that Justice Powell cast the swing vote of the *Almeida-Sanchez* decision; in his concurring opinion, he specifically states that the issue of the constitutionality of "temporary" checkpoint searches was not before the Court. *Almeida-Sanchez, supra*, at 276.

Finally, with respect to the Defendant's contention that *Speed, Rainer* is a definitive holding, this Court would note that the opinion was written by Judge Lewis R. Morgan and was delivered on December 28, 1973. Yet in *United States* v. *Merla*, — F.2d —, (5th Cir., May 6, 1974, No. 73-3660), Judge Morgan participated in a Per Curiam opinion concerning the Sarita checkpoint, which is identical to the Falfurrias checkpoint, wherein the panel implies that the question of border equivalency of that checkpoint is still an open one.

Counsel had also cited to the Court the case of *United States* v. *Lonabaugh, supra*, and *United States* v. *Byrd, supra*, and *United States* v. *Bowen, supra*. In *Lonabaugh*, the critical issues were the border equivalency of an airport and the presence or absence of exigent circumstances

to search a detained suitcase. In *Byrd*, the Court had before it a roving Border Patrol search. Both of these cases are factually distinguishable from the search before this Court.

The *Bowen* case presents a larger problem. In *Bowen*, the Ninth Circuit had originally affirmed Per Curiam the narcotic conviction arising out of checkpoint search in *United States* v. *Bowen*, 462 F.2d 347 (C.A. 9, 1972). The case was appealed to the Supreme Court, who vacated the Ninth Circuit opinion and ordered that case remanded for consideration in light of *Almeida-Sanchez* v. *United States, supra*. *Bowen* v. *United States*, 413 U.S. 915 (1973). On remand, the Ninth Circuit took the case up *en banc* and held 7 to 6 that the search was clearly illegal under the *Almeida-Sanchez* rationale. The effect of *Bowen* is to disqualify all interior highway checkpoints of this nature as functional equivalents of the border and require probable cause for all searches carried out at "fixed" highway checkpoints. While this Court is not bound by the *Bowen* decision, it wishes to consider it in light of the similarity of the factual and legal issues raised to those in the case at bar. Bowen was stopped at a fixed checkpoint forty-nine highway miles from the border, on a road that leads directly to the border itself. The searching officer was looking inside the camper for aliens, when he detected the odor of marihuana and later found 365 pounds of marihuana. The *en banc* majority held that this search was illegal under *Almeida-Sanchez*. The marihuana search seems to have been made on probable cause, but the facts which gave rise to the probable cause were fruits of the poisonous tree, because in "plain view" theory, the sensing officer must be legally located in the position from which he gains his inadvertent perceptions upon which his probable cause is based. Under this rationale, the implicit holding of *Bowen* is that the Border Patrol did not have the right to be in the camper to make the initial search for aliens. He lacked this right because the checkpoint in question failed to have the factual setting to be a border equivalent, as there was no showing that a high per cent of the people who travelled the road had just crossed the

border and the checkpoint was not an interior port of entry in the same sense as the St. Louis airport would be.

From the onset, this Court wishes to direct attention to the dissenting opinion of Judge J. Clifford Wallace, who focuses on the above cited portion of Justice Powell's opinion in *Almeida-Sanchez*, wherein Justice Powell specifically limits *Almeida-Sanchez* to the roving search before that Court. As stated before, this Court is convinced that the holding of *Almeida-Sanchez* is a narrow one and has been joined in this feeling by the Fifth Circuit, *United States* v. *Byrd*, *supra*, and by Chief Judge Ben C. Connally of the Southern District of Texas, who, like the undersigned, is widely versed in subject of alien control in border areas, in his Memorandum and Order of May 13, 1974, in *United States* v. *William Christian Boecker*, Criminal No. 74-L-27, in the Laredo Division of this Court. But aside from this serious reservation, this Court notes, as is pointed out in the majority opinion in *Bowen*, that the touchstone of non-warrant searches under the Fourth Amendment is reasonableness. In *Bowen*, the Court acknowledged the fact that not every car passing the checkpoint was stopped and not every car stopped was searched. Thus, room for discretionary whim still existed. But the *Bowen* court then reasoned further that, this point aside, it found nothing in the *Almeida-Sanchez* decision which would limit its application to only roving patrols:

> "Nonetheless, even conceding that a fixed checkpoint search might be less of an imposition on domestic travelers than a roving patrol search, we are able to find nothing in the opinion of the Court in *Almeida-Sanchez* which suspends Fourth Amendment standards in dealing with immigration searches at fixed checkpoints." (Pages 5-6 of ship opinion.)

As this Court has stated above, it is the whimsical nature of the search in *Almeida-Sanchez* that made it unreasonable. This Court is aware of certain "wave by" techniques that are used at some checkpoints, but it is the evidence before this Court that the checkpoint in question had the policy of questioning all who passed by. A checkpoint

where everyone is stopped removes the arbitrariness of the search and in the mind of this Court renders *Almeida-Sanchez* inapplicable. Consequently, this Court must respectfully disagree with the Ninth Circuit and hold that *Almeida-Sanchez* does not govern the factual setting of the case before it. It is interesting to note that out of the thirteen judges who participated in the *Bowen* decision, only Chief Judge Richard H. Chambers and Judge Wallace live on or near the Mexican border and both of them dissented in the *Bowen* opinion.

Since the checkpoint in the case at bar was the functional equivalent of the border, the initial search was legal. Consequently, the second search was also legal, as it was accompanied by probable cause gained in the first search and exigent circumstances. Agent Kieffe testified that the car was riding low in the back—an impression that is confirmed by the sheer bulk of the discovered contraband, 660 pounds—and that while inspecting the occupants and the vehicle, he smelled the scent of marihuana. This olfactory impression was gained while he was standing in a place where he had a right to be and was inadvertent on his part. As such, it comes under the plain view doctrine which applies to all sensory impressions gained by an officer who is legally present in the position from which he gains them. *United States* v. *Leazar*, 460 F.2d 982 (C.A. 9, 1972); *United States* v. *Perry*, 339 F.Sup. 209 (D.C. Cal. 1972). This smelling of marihuana did not constitute a search, *Walker* v. *Beto*, 437 F.2d 1018 (C.A. 5, 1971), but, when combined with the fact that it emanated from a low-riding automobile, gave Agent Kieffe probable cause to search the entire car. I need only add that the search was attended by exigent circumstances in that a moving automobile was being searched on the open road. *Carroll* v. *United States*, 267 U.S. 132 (1925).

In conclusion, the initial stop and inspection was legal, because it was carried out at the functional equivalent of the border and it was reasonable to stop all who passed that point for an inspection. The second search, which revealed 660 pounds of marihuana, was a legal consequence of the first search and was itself legal, based as it was on probable cause and exigent circumstances. The

only way that the searches in question could be invalidated would be for this Court to hold 8 U.S.C. 1357 unconstitutional—the statute authorizing Border Patrol agents to make the initial stop—a step this Court declines to take.

On May 31, 1974, the Defendant appeared with counsel and in open court announced that he wished to waive a jury and submit his case to the Court on the testimony adduced at the hearing, along with the stipulation that the seizure weighed 660 pounds and contained marihuana. The evidence on the question of innocence or guilt is quite simple. While making a traffic checkpoint inspection, Border Patrolman Kieffe noticed the smell of marihuana about the Defendant's heavily loaded car. On opening the trunk of the car, Officer Kieffe found 660 pounds of marihuana, an amount sufficient for this Court to presume commercial intent. This Court is convinced beyond a reasonable doubt that the Defendant knowingly possessed 660 pounds of a substance that he knew to be marihuana and, therefore, finds him guilty as charged of possessing 660 pounds of marihuana, with intent to distribute, in violation of 21 U.S.C. 841(a)(1).

The Defendant, Rodolfo Trinidad Fuentes, will present himself to the Court on Monday, July 8, 1974, at 9:30 a.m. for sentencing.

The Clerk will send copies of this Memorandum and Order to the Defendant and his counsel and to the United States Attorney.

DONE at Brownsville, Texas, this 13th day of June, 1974.

REYNALDO G. GARZA
United States District Judge

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

U. S. Border Patrol
P. O. Box 1178
McAllen, Texas 78501

May 31, 1974

(Filed June 5, 1974)

MCA 40/11-C

Mr. John P. Smith
Assistant U. S. Attorney

Southern District of Texas
P. O. Box 1671
Brownsville, Texas 78520

Dear Mr. Smith:

In accordance with your request I am enclosing an affidavit which I hope meets your need.

I have also included a voided copy of Form I-186 and copies of Forms G-23-17 for Fiscal Year 1973, showing apprehension statistics for the three Border Patrol Stations. This material has been included for whatever relevancy it may have to the matter.

Sincerely,

LEO E. DUNNIGAN, Acting
Chief Patrol Agent

AFFIDAVIT

LEO E. DUNNIGAN, Acting Chief Patrol Agent of the McAllen, Texas Sector, U. S. Border Patrol, being duly sworn deposes and says:

Non-immigrant Mexican aliens who have been issued Form I-186, Non-Resident Alien Mexican Border Crossing Card, may be admitted to the United States without other documentation. When used as the sole entry document the Form I-186 is valid only for visits to the United States within 25 miles of the Mexican border for a period of seventy-two (72) hours or less.

The following statistics, from official records, reflect the number of alien visitors with Forms I-186 who were apprehended at Border Patrol traffic checkpoints near Falfurrias, Kingsville and Rio Grande City, Texas during Fiscal Year 1973. These aliens were destined to the interior of the United States without the proper additional documentation as required:

Falfurrias	244
Kingsville	231
Rio Grande City	116

LEO E. DUNNIGAN

SUBSCRIBED AND SWORN TO, before me, this 31st day of May, 1974.

DOLORES SANCHEZ
Notary Public in and for Hildalgo County, Texas

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

DEPORTABLE ALIENS LOCATED BY BORDER PATROL

Month: FY-73
Reporting office: RIO GRANDE CITY STATION

IV. BORDER PATROL (Contd.)

Operation	TOTAL (Columns 2-12)	Status at entry: Agricultural worker	Visitor	Student	Crewman D-1: Non-willful violator	Crewman D-1: Willful violator	Crewman D-2: Non-willful violator	Crewman D-2: Willful violator	Immigrant	Stowaway	E. W. I.	Other	Length of time illegally in U. S.: At entry	Within 72 hours	4-30 days	Over 30 days	8 U. S. C. 1324, 1327, 1328: Principals	Aliens: By aircraft	By watercraft	By other means	Fraudulent claim to USC: Presented documents	Unsupported oral claims	Fraudulent claim to legal status: Alien Registration Receipt Card (I-151)	Non-resident Alien Mexican Border Crossing Card (I-186)	Other
	1	2a	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25
1. TOTAL (Lines 2-10)	1704		215			1			6		1440	42	825	762	123	30	82			302	39	6	6	6	
2. Line watch	886		27						1		864	4	768	60	23	7	11			32	6	1	1		
3. Patrol																									
4. Farm-ranch check	241		22								217	2	2	123	76	18	1			2	2			2	
5. Traffic check	444		116			1			5		288	34	34	227	5	2	70			247	31	5	5	4	
6. Transportation check - Total																									
(a) Bus																									
(b) Passenger train																									
(c) Freight train																									
(d) Aircraft																									
7. City patrol	92		44								46	2	1	35	7	3									
8. Boat patrol																									
9. Crewman-stowaway																									
10. Turned over to BP by other agencies	31		6								25			17	6	2									
11. *Observation aircraft	453		4								449														
12. *Electric eyes																									
13. *Ultraviolet light	1											1													
14. *Other elec./mech. devices	16										16														

* Included in appropriate activity, lines 2 through 10.

CREWMAN - Exclude crewmen on 29-day permits.

E. W. I. - Place of entry - Station area

TOTAL	CRU	ECJ	CAO	ELC	CAX	YUM	TNA	GRN	CAC	TCA	NGL	DGL	LOS	CLM	EPT	FBN	FHT	SBT	VHT	MAR	PRS	APT	SNN	COM	DRT	EGT	CAB	LRT	HEB	RGC	NCA	MER	HRL	BRP	BLW
1440											1				2										1		24		1136	478	42		36	

LMD	CHS	CDV	BOH	WTW	BRN	SWC	HYM	MET	WOL	PRT	SCT	PMB	ARM	INT	SMM	SAM	PHM	DTM	TRE	BLN	NIB	WAT	OGN	MNB	MLB	ROB	SWB	RIB	DRV	BVB	JMB	VMB	PTM	MLV	LMB	CMB

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UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

DEPORTABLE ALIENS LOCATED BY BORDER PATROL

Month: FY-73
Reporting office: FALFURRIAS STATION

IV. BORDER PATROL (Contd.) Operation	TOTAL (Columns 2-12)	Status at entry: Agricultural worker	Visitor	Student	Crewman D-1: Non-willful violator	Crewman D-1: Willful violator	Crewman D-2: Non-willful violator	Crewman D-2: Willful violator	Stowaway	E. W. I.	Other	Length of time illegally in U. S.: At entry	Within 72 hours	4-30 days	Over 30 days	8 U.S.C. 1324, 1327, 1328: Principals	Aliens: By aircraft	Aliens: By watercraft	Aliens: By other means	Fraudulent claim to USC: Presents documents	Fraudulent claim to USC: Unsupported oral claims	Fraudulent claim to legal status: Alien Registration Receipt Card (I-151)	Fraudulent claim to legal status: Non-resident Alien Mexican Border Crossing Card (I-185)	Fraudulent claim to legal status: Other
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25
1. TOTAL (Lines 2-10)	2727		311						51		2124	241		1172	687	765	61			202	256	13	55	12	
2. Line watch																									
3. Patrol	302		3								249			159	139	5	4			31					
4. Farm-ranch check	300		34								297			53	169	65				1					
5. Traffic check	1220		244						40		716	220		539	163	15	55			155	234	12	44	12	
6. Transportation check - Total	437		42						11		470	14		266	82	126					18	1	11		
(a) Bus	282		40						10		218	14		42	61	115					17	1	10		
(b) Passenger train																									
(c) Freight train	255		2						1		252			220	21	11							1		
(d) Aircraft																									
7. City patrol	32		6								23	3		8	12	3	2			15	3				
8. Boat patrol																									
9. Crewman-stowaway																									
10. Turned over to BP by other agencies	336		13								319	4		196	126	51					1				
11. *Observation aircraft	113										113														
12. *Electric eyes																									
13. *Ultraviolet light	18											18													
14. *Other elec./mech. devices	37										37														

* Included in appropriate activity, lines 2 through 10.

CREWMAN - Exclude crewmen on 29-day vessels.

E. W. I. - Place of entry - Station area

TOTAL	CHU	ECJ	CAO	ELC	CAX	YUM	TNA	GBN	CAG	TCA	NGL	DGL	LOB	CLM	EPT	FBN	FHT	SBT	VHT	MAR	PRS	AFT	SNN	COM	DRT	EGT	CAR	LRT	HYD	RGC	MCA	MER	HDL	BRP	BLW
2124														7							2				44	40		488		110	1125	155		153	

LND	ORB	COV	BCN	WHP	BRN	SWC	HVM	MLT	WOL	FRT	BOT	PMB	WRM	INT	CMM	SMV	PHM	DTM	TRE	ION	NIB	WAT	OGN	MNB	MLB	ROB	SWB	RIB	DBV	BVB	JMB	VMB	FTM	HLT	LMB	CMB

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UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

DEPORTABLE ALIENS LOCATED BY BORDER PATROL

Month: FY-73
Reporting office: KINGSVILLE STATION

IV. BORDER PATROL (Contd.) Operation	1 TOTAL (Columns 2-12)	Status at entry: 2 Agricultural worker	3 Visitor	4 Student	5 Crewman D-1 Non-willful violator	6 Crewman D-1 willful violator	7 Crewman D-2 Non-willful violator	8 Crewman D-2 willful violator	9 Immigrant	10 Nonimmigrant	11 E.V.I.	12 Other	Length of time illegally in U.S.: 13 At entry	14 Within 72 hours	15 4-30 days	16 Over 30 days	8 U.S.C. 1324, 1327, 1328: 17 Principals	18 Alien: By aircraft	19 By watercraft	20 By other means	Fraudulent claim to U.C.: 21 Presented documents	22 Unsupported oral claims	Fraudulent claim to legal status: 23 Alien Registration Receipt Card (I-151)	24 Nonresident Alien Mexican Border Crossing Card (I-186)	25 Other
1. TOTAL (Lines 2-10)	3622		287	2		1			62		1759	361		357	616	76	69			274	357	53	67	5	
2. Line watch	2480		14								934			557	323	2	5			39					
3. Patrol	150										150			10	114	24	1			4					
4. Farm-ranch check	1393		231	2					61		749	350		88	113	31	63			231	356	53	66	5	
5. Traffic check	181										181			136	50	1									
6. Transportation check - Total	14										5			5											
(a) Bus																									
(b) Passenger train																									
(c) Freight train	178										14			127	50	1									
(d) Aircraft																									
7. City patrol	18		1						1		10	6		1	6	3					1		1		
8. Boat patrol																									
9. Crewman-stowaway																									
10. Turned over to BP by other agencies	20		1								17			9	7	4									
11. *Observation aircraft	434										434														
12. *Electric eyes																									
13. *Ultraviolet light																									
14. *Other elec./mech. devices	399										399														

* Included in appropriate activity, lines 2 through 10.

CREWMEN - Exclude crewmen on 29-day vessels.

E. w. i. - Place of entry - Station area

TOTAL	CHU	ECU	CAO	ELC	CAX	YUN	TKA	OBN	FAG	TCA	NGL	DGL	LTB	LRM	LRT	LRV	FBN	LMT	LRT	WHT	WAT	HR	ANT	TNN	CON	DRT	FGT	CAR	LRT	HEB	RGC	MCA	MER	MRL	RPC
1949											1																6	1		15		15	477	137	20	957

BLW	LND	ORV	COV	BDN	WHF	BRN	SHL	HRN	WLT	WCL	PRT	BLT	HWD	WRW	HE	CMV	BW	FNW	DTW	TRE

BUN	MIB	WAT	OGN	WNB	MLB	ROB	SWB	RIB	DBV	BVD	LWB	LMR	SFW	HLT	LMB	CMB

*/ Stations not included by service location code.

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UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

P. O. Box 2539
U. S. Post Office & Courthouse
San Antonio, Texas 78206

June 7, 1974

(Filed June 11, 1974)

To Whom It May Concern:

According to statistical information of this Service, the following nonimmigrant aliens entered at land border ports of entry from Brownsville through Falcon during F.Y. 1973 (July 1, 1972 through June 30, 1973):

Brownsville	—	9,016,853
Progreso	—	866,024
Hidalgo	—	6,800,139
Los Ebanos	—	55,162
Rio Grande City	—	479,760
Roma	—	1,687,013
Falcon	—	118,957
Total		19,023,908

Of these nonimmigrant aliens, over 91% entered by presentation of nonresident alien border crossing cards and were admitted without further documentation for visits within 25 miles of the international boundary for periods not to exceed 72 hours.

Signature: JOE F. STALEY
Joe F. Staley
District Director

Subscribed and sworn to before me at San Antonio, Texas on June 10, 1974.

LAURA THOMAS
Notary Public

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

No. 74-B-102

[Filed Jul 13, 1974]

UNITED STATES OF AMERICA

v.

RODOLFO SIFUENTES

JUDGMENT AND COMMITMENT

On this 12th day of July, 1974 came the attorney for the government and the defendant appeared in person and [1] with counsel, Ballard Bennett.

IT IS ADJUDGED that the defendant upon his plea of [2] not guilty and a verdict of guilty being returned after a trial before the Court and Jury has been convicted of the offense of transporting certain aliens within the United States, in violation of Section 1324(a)(2), Title 8, United States Code, as charged in the Indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [3] Two (2) years on each of Counts 1 and 2; said sentence to run concurrently.

IT IS ADJUDGED that the defendant shall serve a period of SIX (6) MONTHS of the foregoing sentence and the remainder of one (1) year and six (6) months is hereby suspended; and the defendant is placed on probation with supervision, to commence after release from confinement, for three (3) years, conditioned on good behavior.

IT IS ADJUDGED that [5] imprisonment of two (2) years is hereby imposed as to each of Counts 3 and 4; said sentence to run concurrently but consecutively to sentence imposed in Counts 1 and 2; IT IS FURTHER ADJUDGED that these two (2) years are hereby suspended, and the defendant is placed on probation with supervision for three (3) years, conditioned on good behavior, and further conditioned that he submit to treatment for his drinking problem.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

APPROVED AS TO FORM:

/s/ Charles F. Sandoval
CHARLES F. SANDOVAL, AUSA

/s/ Reynaldo G. Garza
United States District Judge
V. BAILEY THOMAS
Clerk

The Court recommends commitment to [6] Done at Brownsville, Texas, this 13th day of July, 1974.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

Criminal No. 74-B-102

[Filed Jul 16, 1974]

UNITED STATES OF AMERICA

vs.

RODOLFO SIFUENTES

DEFENDANT'S NOTICE OF APPEAL

Sentence having been imposed in the above styled and numbered cause on July 12, 1974, notice is hereby given that Rodolfo Sifuentes, Defendant in the above styled and numbered cause, hereby appeals to the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana, from the final judgment in this cause.

/s/ Ballard Bennett
BALLARD BENNETT
Court-Appointed Attorney
for Defendant, Rodolfo
Sifuentes
P. O. Box 102
Weslaco, Texas 78596
512-968-8111

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

July 31, 1975

TO COUNSEL OR PARTIES LISTED BELOW:

No. S74-2961—USA v. RODOLFO SIFUENTES

Gentlemen:

You are hereby notified that a panel of this Court, after due consideration and pursuant to Local Rule 18, has transferred the referenced case to the Summary Calendar for disposition.

Local Rule 18 states: "(a) Whenever the Court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar. (b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the Clerk, pursuant to directions from the Court. (c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar."

Yours sincerely,

EDWARD W. WADSWORTH, Clerk
BY: /s/ Joan Perkins

Mr. Ballard Bennett
Mr. John Patrick Smith

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-2961

Summary Calendar*

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

vs.

RODOLFO SIFUENTES, DEFENDANT-APPELLANT.

Appeal from the United States District Court
for the Southern District of Texas

(August 8, 1975)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM:

The judgment of conviction appealed from is affirmed. United States v. Santibanez, 5 Cir. 1975, — F.2d —. See Local Rule 21.[1]

---

* Rule 18; 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-5387

RODOLFO SIFUENTES, PETITIONER,

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is set for oral argument in tandem with No. 74-1560, United States v. Amado Martinez-Fuerte.

November 11, 1975

Mr. Justice Douglas took no part in the consideration or decision of this motion and petition.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 389840 177

No. 75-5387

ORIGINAL COPY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

RODOLFO SIFUENTES, PETITIONER

v.

UNITED STATES OF AMERICA

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

Department of Justice,
Washington, D. C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-5387

RODOLFO SIFUENTES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that the warrantless stop of his vehicle by Border Patrol officers at a fixed immigration checkpoint was unlawful under the Fourth Amendment because the officers lacked a reasonable suspicion that the vehicle contained aliens illegally in the country.

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on four counts of transporting aliens who were illegally in this country, in violation of 8 U.S.C. 1324(a)(2). He was sentenced to concurrent terms of two years' imprisonment on counts 1 and 2, with all but six months of the sentence suspended in favor of three years' probation. He was sentenced to concurrent terms of two years' imprisonment on counts 3 and 4, to run consecutively with the sentences imposed on counts 1 and 2; the sentences on counts 3 and 4, however, were suspended in favor of three years' probation. The court of appeals affirmed (Pet. App. A).

The evidence at petitioner's trial [1] established that the vehicle he was driving was stopped at a permanent immigration checkpoint near Sarita, Texas, at about 3:00 A.M., on April 28, 1974, as he was traveling north on U.S. Highway 77 about 65 miles north of the Mexican border. As a Border Patrol officer on duty approached the vehicle to inquire about petitioner's citizenship and immigration status, he observed four other persons in the vehicle, one in the front seat and three in the rear, who were slumped down in the seats as if asleep. Upon questioning the four passengers, the officer determined that they were citizens of Mexico and had no documentation authorizing them to be in this country. Petitioner and the four aliens were then taken into custody (Pet. App. B; Tr. 14-20). [2]

The checkpoint at which petitioner was stopped is located on U.S. Highway 77, which originates in Brownsville at the Mexican border and is one of two major arteries leading north out of the lower Rio Grande valley. The checkpoint is equipped with appropriate stop signs and warning lights; it is lighted by flood lights during hours of darkness (Tr. 16-17, 23-24). The facility is operated 24 hours a day, except when inclement weather or

---

1/ No separate hearing was held on petitioner's pre-trial motion to suppress the evidence derived from the stop of his vehicle. The court reserved ruling on the motion until evidence relating to the stop of the vehicle was presented at trial (Tr. 2, 4, 14-15).

2/ The four aliens who were apprehended testified at trial that, in accordance with prior arrangements, petitioner picked them up and transported them north after they had illegally crossed the border by swimming the Rio Grande River. The question whether such voluntary testimony of a witness at trial is subject to suppression as the fruit of an allegedly illegal stop was not raised in the courts below, and we do not raise it here.

...checkpoint stops require its closing (Tr. 16). At the time petitioner was stopped, the officers on duty were stopping all northbound vehicles except those whose occupants the officers recognized as local inhabitants of the area (Tr. 16, 22-23).

At the close of the government's case, the court orally denied petitioner's motion to suppress (Tr. 147-148). The court subsequently filed a written memorandum denying the motion (Pet. App. B). The court of appeals affirmed summarily in reliance upon its recent decision in United States v. Santibanez, C.A. 5, No. 74-3382, decided August 11, 1975 (Pet. App. A), which upheld the validity of a routine, warrantless stop of vehicles at the fixed immigration checkpoint near La Gloria, Texas. The court in Santibanez held that there is "no constitutional dereliction in stopping vehicles at this permanent checkpoint for the purpose of determining the occupant's citizenship" (Pet. App. A, p. 2).

This case differs from United States v. Martinez-Fuerte, No. 74-1560, certiorari granted, October 6, 1975, in one material respect. The stop in Martinez-Fuerte was made pursuant to a judicial warrant authorizing such stops, whereas the officers in the present case were acting in the absence of a warrant. As we stated in our petition for a writ of certiorari in Martinez-Fuerte (a copy of which we are sending to petitioner's counsel), it is our contention that "investigative stops of vehicles at checkpoints involve so brief and limited an interference with the legitimate privacy interests of the traveling public that they may lawfully be conducted without advance judicial approval" (p. 11).

Although we view that as the threshold issue in Martinez-Fuerte, we recognize that the Court might take a different view and, without considering the lawfulness of a stop in the absence of a warrant, uphold the stops in Martinez-Fuerte because they had been authorized in advance by a magistrate. Since there was no warrant in this case, the petition squarely presents the question that the Court might find unnecessary to reach in Martinez-Fuerte.

Because of the importance of that question to the Border Patrol's law enforcement efforts, particularly within the jurisdiction of the Fifth and Tenth Circuits where the courts of appeals have upheld the validity of warrantless checkpoint stops, we believe it would be appropriate to grant the petition for a writ of certiorari in this case and consolidate it for argument with Martinez-Fuerte.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

Supreme Court, U. S.
FILED
JAN 9 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5387

RODOLFO SIFUENTES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

BALLARD BENNETT
214 Henson Building
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(512) 968-8111

Attorney for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5387

RODOLFO SIFUENTES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The District Court's memorandum opinion of August 2, 1974 (A. 31-32), is unreported; however, there is expressly incorporated by reference in this memorandum opinion the opinion of the same Court in the case of *United States v. Fuentes*, (A. 33-53), which

opinion is reported at 379 F.Supp. 1145.[1] The Court of Appeals affirmed summarily in the present case, citing only its recent decision in *United States v. Santibanez* (A. 58). The judgment of the Court of Appeals in the present case is reported in the table appearing at 517 F.2d 1402. The opinion in *United States v. Santibanez* is published at 517 F.2d 922.[2]

JURISDICTION

The judgment of the Court of Appeals was entered August 8, 1975 (A. 58). The petition for writ of certiorari was filed September 4, 1975, and it was granted on November 11, 1975 (A. 59), with the directive that oral argument would be in tandem with *United States v. Martinez-Fuerte*, Supreme Court No. 74-1560. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND REGULATION INVOLVED

1. The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[1] The Court of Appeals summarily affirmed *United States v. Fuentes*; see the table at 517 F.2d 1401 (C.A. 5).

[2] A rehearing en banc has been denied by the Court of Appeals in *United States v. Santibanez*; see the table at 520 F.2d 944 (C.A. 5).

2. Section 287(a) of the Immigration and Nationality Act, 66 Stat. 233, 8 U.S.C. 1357(a), provides in pertinent part:

> Any officer or employee of the [Immigration and Naturalization] Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> * * * * *
>
> (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; * * *

3. 8 C.F.R. 287.1 provides in pertinent part:

> (a)(1) *External boundary.* The term "external boundary," as used in section 287(a)(3) of the Act, means the land boundaries and the coast line of the United States, including the ports, harbors, bays and other enclosed arms of the sea along the coast, and a marginal belt of the sea extending three geographic miles from the outer limits of the land that encloses an arm of the sea.
>
> (2) *Reasonable distance.* The term "reasonable distance," as used in section 287(a)(3)

of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned, any distance fixed pursuant to paragraph (b) of this section.

(b) *Reasonable distance; fixing by district directors.* In fixing distances not exceeding 100 air miles pursuant to paragraph (a) of this section, district directors shall take into consideration topography, confluence of arteries of transportation leading from external boundaries, density of population, possible inconvenience to the traveling public, types of conveyances used, and reliable information as to movements of persons effecting illegal entry into the United States: *Provided*, That whenever in the opinion of a district director a distance in his district of more than 100 air miles from any external boundary of the United States would because of unusual circumstances be reasonable, such district director shall forward a complete report with respect to the matter to the Commissioner, who may, if he determines that such action is justified, declare such distance to be reasonable.

QUESTIONS PRESENTED

I. Did the Court of Appeals correctly decide that the rights of Petitioner under the Fourth Amendment to the Constitution had not been violated when he was stopped without cause, suspicion or warrant at a permanent Border Patrol checkpoint between 65 and 90 miles from the border for the purposes of inspecting and questioning him and visually searching the lower interior of his vehicle?

II. Away from the border, do the same Fourth Amendment rules and guarantees apply to stops at Border Patrol checkpoints as apply to stops by Border Patrol roving patrols?

III. Do Fourth Amendment guarantees forbid the Border Patrol, without a warrant of any kind, from making an investigative stop of every vehicle that travels through a permanent checkpoint located many miles from the border?

STATEMENT OF THE CASE

Facts

In the early morning hours of April 28, 1974, the Petitioner's car was routinely stopped by the United States Border Patrol at the checkpoint it operates near Sarita on U.S. Highway 77 (A. 11-13). The Petitioner was driving his car on this occasion (A. 13). Border Patrol Agent De Leon, who was checking the cars stopped at the checkpoint, could see only the Petitioner in the car as he approached the stopped vehicle (A. 13, 17); but when he got near enough to see down onto the car's seats, he saw another person on the front seat and three more persons on the back seat, all lying down and pretending to be asleep (A. 13, 17, 22-24). These four passengers could not be seen from the car's window by Agent De Leon until he got "right on" the car; therefore, he would not have seen them if he had not walked over and looked down into the stopped vehicle (A. 22-24). Agent De Leon questioned the four passengers in Petitioner's car and determined they were all citizens of Mexico who did not have papers (A.

13-14); and the Petitioner was subsequently charged with illegally transporting these four aliens on this occasion (A. 4-5).

The Petitioner was arrested at the checkpoint; and he drove an officer and these four aliens to the Kingsville jail, where he and the aliens were confined (A. 29). The four aliens, after being found guilty of being in the United States illegally and receiving suspended sentences on April 29, 1974, were held in jail as material witnesses by the Government until the trial of Petitioner (A. 28).

The Border Patrol checkpoint at which Petitioner's car was stopped is about 90 miles north of Brownsville, Texas (A. 12). This is a permanent checkpoint which is operated 24 hours a day and is closed only when bad weather causes poor visibility on the highway (A. 15). It is between 65 and 90 miles from the nearest point on the Mexican border (A. 15-16).

At the time in question, all vehicles passing north through this checkpoint were being stopped and checked, except those containing persons the officers could recognize as being residents of the checkpoint area (A. 12). It was the routine at this checkpoint for an officer to approach close enough to every stopped vehicle to enable him to visually inspect its interior, unless the occupants proved to be local people who were known to the officer (A. 25-26). There were two officers working at the checkpoint and two more backed them up as "road officers" (A. 18). The Border Patrol agent did not know that the four passengers were illegal aliens until they were interrogated after Petitioner had been stopped at the checkpoint (A. 18).

U.S. Highway 77, on which the checkpoint in question is located, runs north from the Mexican

border, and between the checkpoint and the border on this highway are the cities of Brownsville, San Benito, Harlingen and Raymondville, which are fairly large cities (A. 18). There are also several small communities on this highway between the border and the checkpoint, and two entire counties–Willacy County and Cameron County–lie between these points (A. 18-19). U.S. Highway 77 runs north from the checkpoint to Kingsville, Victoria and on beyond into the interior (A. 18). A substantial amount of traffic flows north on U.S. Highway 77 and through this checkpoint (A. 19).

This checkpoint has been located at the same spot since August, 1973, but the Border Patrol had a moving checkpoint in this area for some years before that time (A. 25, 27-28). There are signs, flashing lights, traffic cones and official vehicles at this checkpoint (A. 16-17).

Trial in the District Court

In the Southern District of Texas, Brownsville Division, Petitioner was charged in a four-count Indictment with transporting the illegal aliens by means of a motor vehicle from near Progreso, Texas, to near Sarita, Texas, in violation of Section 1324(a)(2), Title 8, United States Code (A. 4-5).

Before trial Petitioner moved to suppress all evidence obtained by the Government at the time of or as a result of the stopping of his automobile at the checkpoint (A. 1, 6-8), and the trial court elected to "carry it along" (A. 9-10) and heard this motion with the jury trial on the merits (A. 11, 29-30). The Petitioner entered a plea of "not guilty" to all four

counts (A. 1). At the trial no other witnesses were called by the Government except Border Patrol Agent De Leon and the four aliens who had been in Petitioner's vehicle, and the testimony of these witnesses was admitted into evidence despite Petitioner's objections and his motion to suppress same (R., vol. II, 7-147, 258). The motion to suppress was overruled when the Government rested its case (A. 28-29). The motion was renewed at the close of all the testimony and again was overruled (A. 29-30). The jury found the Petitioner "guilty" on all four counts (A. 2). He was sentenced to concurrent terms of two years of imprisonment on counts 1 and 2, with all but six months of the sentence suspended in favor of three years of probation. He was also sentenced to concurrent terms of two years of imprisonment on counts 3 and 4, to run consecutively with the sentence imposed on counts 1 and 2; but the sentence on counts 3 and 4 was suspended in favor of three years of probation (A. 54-55).

Court of Appeals

An appeal was taken to the United States Court of Appeals for the Fifth Circuit (A. 3, 56). Thereafter, the Court of Appeals, sua sponte, transferred the case to its Summary Calendar for disposition without oral argument (A. 57) and summarily affirmed the conviction (A. 58).

SUMMARY OF ARGUMENT

I.

The Ninth Circuit in *United States v. Martinez-Fuerte*, 514 F.2d 308 (C.A. 9), certiorari granted October 6, 1975, was correct when it held that "the probable, indeed actual, degree of interference with the rights of innocent persons at the checkpoint is intolerable" (*id.* at 322). The Fifth Circuit was wrong when it determined that Petitioner's constitutional rights were not violated by the Border Patrol when he was stopped at the checkpoint because the stop was not sufficiently intrusive. Judicial precedents support the holding of the Ninth Circuit.

A. There is a constitutional guarantee that travelers lawfully within this country are entitled to use the public highways without interruption or search unless there is a probable cause for a search. *Carroll v. United States*, 267 U.S. 132, 154. But despite the cases which support this guarantee, it was previously claimed that the Border Patrol could, away from the border, stop a motorist, question him and search his vehicle for aliens, without warrant, reasonable suspicion or probable cause. A large portion of this claimed exception to the free-passage doctrine was refuted by the cases of *Almeida-Sanchez v. United States*, 413 U.S. 266, *United States v. Brignoni-Ponce*, 95 S.Ct. 2574, and *United States v. Ortiz*, 95 S.Ct. 2585; but these cases did not resolve the question of whether the Border Patrol can stop a motorist, question him and visually search the interior of his vehicle, without warrant, cause or suspicion, at a permanent interior checkpoint. However,

there would appear to be no significant distinction between stops by roving patrols, which were held to be unlawful without reasonable suspicion, and stops at checkpoints, except perhaps that the operations of the checkpoints constitute a greater impediment to the free passage of travelers than do roving-patrol operations.

B. While the Fourth Amendment forbids only "unreasonable" searches and seizures, in determining whether a search and seizure is "unreasonable" the starting point is whether the officer had a valid warrant, as there are only a few specifically established and well-delineated exceptions to the warrant requirement. *Katz v. United States*, 389 U.S. 347. One of the most important exceptions to the warrant requirement involves a search made incident to a lawful arrest. When Petitioner was stopped at the Sarita checkpoint, his constitutional rights were intruded upon in the following ways: (1) by the stop, which took him into official custody (or seized him and his car); (2) by the agent conducting a visual search of his car's interior; and (3) by being questioned. Since these unlawful intrusions were accomplished before the formal arrest of Petitioner, the arrest could not validate the prior intrusions.

Another exception to the warrant requirement permits the searching of a vehicle when the acting officer has facts or information constituting probable cause to believe that an offense involving the particular vehicles was being committed. But in the case of a roving-patrol stop for an immigration investigation, only reasonable suspicion is required. The routine checkpoint stop, however, is made without either probable cause or reasonable suspicion concerning the particular vehicle being halted.

In the case involving the narrow field of commercial enterprises that are federally licensed, such as dealing in guns, a limited inspection can be made without a warrant or specific facts justifying the intrusion. But this exception to the warrant requirement is based upon the proposition that a man who elects to engage in such a business which is closely regulated and licensed must accept the burdens with the benefits. Obviously, this exception has no application to the interior checkpoints where intrusions are made upon all travelers who are motoring north.

The last exception to the warrant requirement needing consideration is the "stop and frisk" situation of *Terry v. Ohio*, 392 U.S. 1. It has been held that if an officer conducts such a "stop and frisk" of a person in a street encounter, the officer must have first been aware of specific facts which would lead a reasonable man to believe that such actions are appropriate. This reasoning was extended to the situation involving a roving patrol stop for an immigration investigation. However, the cases in this area strongly support the proposition that a routine checkpoint intrusion is unlawful because it is done without any specific facts concerning the particular vehicle that is stopped.

C. Mr. Justice Powell in his concurring opinion in *Almeida-Sanchez v. United States, supra*, 413 U.S. 266, 275-285, suggested that roving patrol stops could be authorized by obtaining an area-type warrant based upon supporting information relating to criminal activity in the area and other factors, rather than upon information concerning a particular vehicle. Such a procedure would be an expansion of that approved in the administrative inspection situation presented in

Camara v. Municipal Court, 387 U.S. 523. Since the Border Patrol in the present case had not obtained a warrant, these opinions can not be used to justify the intrusions of Petitioner's rights at the checkpoint because neither opinion suggested that a warrant could be completely excused.

II.

The Government has in other cases involving Border Patrol stops attempted to justify the intrusions simply on the ground that they were "reasonable." Applying the "reasonableness" test requires the balancing of the magnitude of the intrusions involved against the public need for the Government to accomplish the intrusions.

A. When a motorist comes within sight of agents at the checkpoint, he is immediately deprived of his right to free passage for he then comes within the custody and control of such agent. Should he decline to stop at the checkpoint, he will be pursued and captured. Also, the right of personal secrecy and privacy is violated at the checkpoint. The motorist has an area in the lower portion of his vehicle which can not be seen from the outside when traveling at highway or even lesser speeds. This area of vehicular privacy is violated by the checkpoint procedures. The verbal probes at the checkpoint further violate this basic right.

Travelers also have a right to be free from arbitrary interference and regimentation by the Government. The continuous and massive intrusions at the checkpoints instinctively repel free people. Though a checkpoint stop may not be as frightening to the individual as a

stop by a roving patrol, it is in reality considerably more dangerous because, at least at the Sarita checkpoint where Petitioner was stopped, it takes place in the middle of a major highway where cars coming up from the rear are traveling at highway speeds. A drunk driver and a checkpoint are a dangerous mixture.

In considering the magnitude of the checkpoint intrusions, it should be kept in mind that the residents of the border area must face them again and again. A roving-patrol stop may be an isolated experience for the individual who is stopped, but the checkpoint stop comes on every occasion that a motorist leaves the border area. It is specious to isolate one checkpoint stop and say that it is of little consequence when millions of such intrusions occur each year.

A large portion of the population of the Lower Rio Grande Valley of Texas, who must go through the Sarita checkpoint or some other checkpoint in order to travel north, have some of the characteristics which could be deemed "suspicious" under the opinion in *United States v. Brignoni-Ponce, supra*, 95 S.Ct. 2574, 2582–they are of Mexican ancestry and poorly groomed. The checkpoint is a particularly unpleasant experience for this large segment of the lawful residents of this area since such characteristics can earn them a prolonged investigation at the checkpoint. On the other hand, people who are wealthy enough to buy or rent an airplane need never even encounter a checkpoint; it is only the poor and middle classes which have no alternative but to pass through them if they travel north from the border. "Field interrogations" are a major source of friction between police and minority groups, and the checkpoints clearly fall into this category.

B. If there are in fact 10 to 12 million illegal aliens now in this country, with 85 percent having come from Mexico, this would strongly indicate that the checkpoints, which allegedly are the backbone of the Border Patrol's enforcement efforts, are not effective and not indispensable. Other statistics confirm this conclusion, such as the fact that during an eight-day period at the San Clemente checkpoint only about 0.12 percent of the vehicles encountered were found to have illegal aliens.

The Border Patrol has not been provided with sufficient men and money to do the job it has been assigned, so it is not surprising that it has chosen to employ these checkpoints. Though the problem of illegal aliens may become substantial, this nation has effectively met greater challenges when it has decided to pay the price in terms of money and materials. The border can be virtually sealed at the Rio Grande and other physical boundaries if this nation decides this objective is worth the cost.

There are other means which could be authorized that would be relatively inexpensive but which could greatly alleviate or perhaps completely solve the illegal alien problem. The most promising of these would be to impose criminal sanctions on the employers of illegal aliens. How can we ever expect to control a problem when we do not even punish the people who create it—the employers of illegal aliens? It would also be beneficial to impound and forfeit vehicles that are used to knowingly transport illegal aliens.

The argument that a particular police procedure is absolutely necessary for law enforcement is always raised whenever such procedure is attacked on consti-

tutional grounds. The Border Patrol has other means of accomplishing its mission besides checkpoints, and there is no evidence that checkpoints well serve the national interests.

C. In the balance between the good and the evil of checkpoints, one extremely important consideration is their great and inherent potential for political abuses. The checkpoints are Orwellian devices which might be employed by a domineering political party, bent on perpetuating itself in power, to manipulate and oppress all or a portion of the public. If held to be constitutional in the present case, there would be no logical, reasonable and fair way to restrict the checkpoints to the south 100 miles of this nation. Also, if such devices can constitutionally be utilized to apprehend illegal aliens, there will be an attempt ~~to~~ by other police organizations to employ them in other law-enforcement areas. In this way our nation could slowly but surely become infested with checkpoints to control various types of crime, and this would greatly impair our freedom. If the illegal alien problem must be eliminated, we should do so with money and materials; the checkpoints are too high a price to pay. They should be eliminated before they spread.

ARGUMENT

I.

THE INTRUSIONS OF THE BORDER PATROL AT THE SARITA CHECKPOINT VIOLATED PETITIONER'S CONSTITUTIONALLY PROTECTED RIGHTS.

With an exhaustive analysis, the United States Court of Appeals for the Ninth Circuit held in *United States*

v. Martinez-Fuerte, 514 F.2d 308 (C.A. 9), certiorari granted October 6, 1975, that with or without an area inspection warrant the Border Patrol must have a founded suspicion in order to stop a vehicle at a permanent interior checkpoint. But in summarily affirming the conviction of Petitioner, the Fifth Circuit cited only its recent opinion in *United States v. Santibanez*, 517 F.2d 922 (C.A. 5), which held without elaboration that there was no constitutional dereliction in stopping a vehicle at a permanent interior checkpoint because "[s]uch a stop is considerably less intrusive than a search" (*id.* at 923).[3] It is submitted that the Fifth Circuit erred in the *Santibanez* case (and also in Petitioner's case) while wholly failing to address itself to important constitutional considerations. On the other hand, the great weight of reason supports the Ninth Circuit's conclusion that "the probable, indeed actual, degree of interference with the rights of innocent persons at the checkpoint is intolerable" (*United States v. Martinez-Fuerte, supra*, 514 F.2d at 322). Judicial decisions in this and related areas buttress the holding of the Ninth Circuit.

[3]The Tenth Circuit has also upheld the warrantless checkpoint procedures. *United States v. Bowman*, 487 F.2d 1229 (C.A. 10).

A. Travelers within this nation have the constitutional right to free passage without interruption or search by officers possessing neither a warrant nor reasonable grounds for suspicion.

Freedom to move within the interior of the United States is a constitutional right of its citizens. *Shapiro v. Thompson*, 394 U.S. 618; *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35. Furthermore, in the landmark opinion of *Carroll v. United States*, 267 U.S. 132, 154, it was proclaimed that travelers lawfully within this country are entitled to use the public highways without interruption or search unless there is a probable cause for a search. A long line of subsequent cases said that, at the very least, there must be probable cause in order to stop and search an automobile. *E.g., Chambers v. Maroney*, 399 U.S. 42; *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216; *Brinegar v. United States*, 338 U.S. 160.

Despite the *Carroll* case and those following it, the Border Patrol has previously taken the position that it could stop and search, by roving patrol or by checkpoint, any and every vehicle found within 100 air miles of the border, without warrant, cause or suspicion, basing this asserted autority on 8 U.S.C. 1357(a) and the regulation pertaining thereto, 8 C.F.R. 287.1. In effect, this claimed authority constituted an exception to the free-passage doctrine and amended the famous language of Mr. Chief Justice Taft found in *Carroll v. United States, supra*, 267 U.S. at 154, as follows:

> But those lawfully within the country, entitled to use the public highways, have a right to free

passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise, [or unless such travelers pass within 100 air miles of the Mexican border over public highways where relatively high-ranking officials of the Border Patrol have decided to install highway checkpoints or operate roving patrols.]

In *Almeida-Sanchez v. United States*, 413 U.S. 266, it was determined that at least a portion of this claimed exception to the free-passage doctrine would not be recognized. The *Almeida-Sanchez* case considered a stop and extensive search by a roving patrol; and two years later there came *United States v. Brignoni-Ponce*, 95 S.Ct. 2574, which involved a stop and questioning by a roving patrol, and its "traveling" companion, *United States v. Ortiz*, 95 S.Ct. 2585, which involved a stop and search of a car's trunk at a checkpoint. These two more recent cases also refused to find that the Government's claimed exception limb had been lawfully grafted on the free-passage tree. However, both the *Brignoni-Ponce* and the *Ortiz* cases left open the question, presented herein, of whether Border Patrol officers may lawfully stop a motorist, question him and visually search the interior of his vehicle, without warrant, cause or suspicion, at an established checkpoint many miles from the border.

It would certainly appear, however, that there is no significant distinction between, on the one hand, stops by roving patrols for questioning, without warrant or reasonable suspicion, which were held to be unlawful in *United States v. Brignoni-Ponce, supra*, 95 S.Ct. 2574; and, on the other hand, stops at checkpoints for

questioning, also without warrant or reasonable suspicion. If there is such a distinction, it is that the operations of checkpoints constitute much greater impediments to traffic than the operations of roving patrols. Every car that passes a checkpoint comes into the custody and control of the Border Patrol, while a roving patrol stops only a very limited portion of the total traffic on a particular road. At the San Clemente checkpoint, involved in *United States v. Ortiz, supra*, 95 S.Ct. 2585, over 10 million cars a year encounter the Border Patrol intrusions (see *id.* at 2587). In this regard, it might also be noted that the word "checkpoint" is a Border Patrol euphemism for a roadblock,[4] and the checkpoints effectively do just that—block roads with signs, traffic cones, flashing lights, uniformed officers and official vehicles (*ibid.* and A. 16-17). There can be no doubt that checkpoints are completely incompatible with the free-passage doctrine of the *Carroll* case.

B. The Border Patrol checkpoint operations do not come within any recognized exception to the warrant requirement of the Fourth Amendment.

It is clear that the language of the Fourth Amendment forbids only "unreasonable" searches and

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[4]Since the courts, in most instances, employ the word "checkpoint" to these police devices, the terms will be used herein, although the word "roadblock" seems to be more descriptive. Unless otherwise indicated, however, "checkpoint" will refer herein to a permanent checkpoint situated many miles from the border and the functional equivalents of the border.

seizures, but it is not so clear how to determine what is "unreasonable" in a specific situation. Since the wording of this Amendment passes smoothly from the prohibition of such unreasonable searches and seizures into an enumeration of the requirements for a warrant, it is not surprising that there has been found a strong link between the question of reasonableness and the requirement for a valid warrant. Thus the presence of or lack of a judicial warrant is almost always the starting point in considering any Fourth Amendment problem because "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions" (*Katz v. United States*, 389 U.S. 347, 357, footnotes omitted). In the instant case there was no warrant, valid or otherwise, so the inquiry turns to whether the operations of the Sarita checkpoint, as inflicted on Petitioner, fall within the few established exceptions to the warrant requirement.

One of the most important exceptions to the requirement of a warrant involves a search or intrusion made incidential to a lawful arrest.[5] But this arrest

[5] The arrest exception to the warrant requirement may be the most frequently invoked of the specifically recognized exceptions. The scope of this exception was tested in the case of *Schmerber v. California*, 384 U.S. 757, involving the removal of a blood sample from a person under a lawful arrest. And because in that instance there was an intrusion beyond the body's surface, it was also required that the officer who directed the blood be taken have reason to believe that there was an emergency in which a delay to obtain a warrant could lead to destruction of evidence. This further requirement was satisfied by the officer having good reason to believe that the man was intoxicated and that, therefore, the percentage of alcohol in his blood was diminishing as time passed. It was also indicated that the blood had to be drawn in a medically sound and safe manner. *Id.* at 769-772.

exception has significant limitations, one being that if the arrest is not itself lawful then it can not support a search incidential thereto. *Beck v. Ohio*, 379 U.S. 89. Consequently, an originally defective arrest can not be justified by what a subsequent search discloses. *Henry v. United States*, 361 U.S. 98. In the *Henry* case FBI agents observed two men loading a car under what the agents considered suspicious circumstances. When the car drove away, the agents followed it, stopped it and arrested Henry after overhearing a request made by him to his companion. The Court in the *Henry* opinion indicated that the stopping of the car was an arrest and that it must therefore be justified on the same basis as any other warrantless arrest; hence stolen property found in Henry's car after his arrest could not be used to establish the probable cause required to authorize the arrest (*id.* at 103-104).[6]

A correlative limitation of the arrest exception to the warrant requirement is that a preceding search or intrusion can not be validated by a subsequent arrest. *Sibron v. New York*, 392 U.S. 40; *Johnson v. United States*, 333 U.S. 10. In the present case the Border Patrol intrusions at the checkpoint, prior to Petitioner's arrest, were threefold. First, the Petitioner was stopped and taken under Border Patrol control, which can also be characterized as a seizure of the person and/or automobile. *United States v. Brignoni-Ponce, supra*, 95 S.Ct. 2574, 2578-2579.[7] Second, the Border Patrol

[6] But *United States v. Ortiz, supra*, 95 S.Ct. 2585, indicated that a stop at a checkpoint is not an arrest; and *United States v. Brignoni-Ponce, supra*, 95 S.Ct. 2574, also indicated that a roving-patrol stop was only a brief detention short of traditional arrest.

[7] Within the meaning of the Fourth Amendment's language, an automobile is considered an "effect." *Cady v. Dombrowski*, 413 U.S. 433, 439.

agent conducted a visual inspection of the lower interior of Petitioner's vehicle. Since this was an area that the agent would not have been able to see if he had not first stopped the car and approached close enough to look down onto its seats, this part of the procedure can properly be characterized as a search. *United States v. Fuentes*, 379 F.Supp. 1145 (S.D. Tex.) *aff'd mem.*, 517 F.2d 1401 (C.A. 5);[8] *cf. State of Texas v. Gonzales*, 388 F.2d 145 (C.A. 5). Third, the agent interrogated the Petitioner and the other passengers in the car.[9] It was only when the Border Patrol agent had accomplished these three checkpoint intrusions of a stop, a search and an interrogation that the arrests of Petitioner and his alien passengers were made. There-

[8]Considering a checkpoint stop and search, Judge Reynaldo G. Garza, who presided at Petitioner's trial, said in *United States v. Fuentes*, 379 F.Supp. 1145 (S.D. Tex.), *aff'd mem.*, 517 F.2d 1401 (C.A. 5), as follows:

> From the onset, this Court wishes to make clear that it is proceeding on the theory that the initial stop was made for the purpose of visually inspecting the passenger section of the car and ascertaining the citizenship of the occupants, pursuant to 8 U.S.C. 1357. *Thus, this Court must pass on the legality under the Fourth Amendment of not one, but two searches: the initial inspection and the subsequent search of the trunk* (*id.* at 1147-1148, emphasis added).

[9]The record clearly reflects that the Border Patrol agent conducted the preliminary interrogation of Petitioner and determined that the passengers were aliens with "no papers" without first warning them of their constitutional rights concerning self-incrimination (A. 13-14). This in itself would seem to be an unlawful procedure in view of *Orozco v. Texas*, 394 U.S. 324, 327, and *Miranda v. Arizona*, 384 U.S. 436, 477, which hold that an individual should be given the required warning when he has been deprived of his freedom of action in any significant way. Obviously, even at the time of this preliminary interrogation the Petitioner and his passengers had been deprived of their freedom to continue on their journey.

fore, Petitioner's arrest could in no way justify the Border Patrol's actions which are here in question.

Another well-defined exception to the warrant requirement for search and seizure is based on the great mobility of the motor vehicle and the problems such mobility creates for law enforcement. This exception provides generally that if it is not practicable to obtain a warrant and if an officer has facts or information constituting reasonable or probable cause to believe that he will find the instrumentality of a crime or evidence pertaining to a crime in a particular vehicle, then the officer may stop and search the vehicle under suspicion. *Chambers v. Maroney, supra*, 399 U.S. 42; *Brinegar v. United States, supra*, 338 U.S. 160; *Carroll v. United States, supra*, 267 U.S. 132. The recent case of *United States v. Brignoni-Ponce, supra*, 95 S.Ct. 2574, extended this exception somewhat in the situation where a roving patrol stops a vehicle to ascertain whether it contains illegal aliens, by holding that Border Patrol officers must have only reasonable suspicion, rather than probable cause, for such a stop. However, the decisions which deal with this exception to the warrant clause do not support the Border Patrol's routine checkpoint intrusions, including those inflicted upon Petitioner, for the reason that these intrusions are made without any prior information or facts which could evoke even a reasonable suspicion about a particular vehicle.

One very limited area in which neither a warrant nor facts justifying the specific intrusion may be required is an inspection, under proper statutory authority, of a commercial enterprise that is federally regulated and licensed. *United States v. Biswell*, 406 U.S. 311;

Colonnade Catering Corp. v. United States, 397 U.S. 72. But this narrow exception is based upon the proposition that there can reasonably be a specific and detailed inspection scheme, carefully limited in time, place and scope, imposed upon a business that has traditionally been closely regulated and licensed by the Government because those who choose to engage therein accept the bitter burdens along with the sweet rewards which accompany an activity such as dealing in liquor (*Colonnade* case) or in firearms (*Biswell* case). Obviously, one who elects to engage in such a business as selling firearms has voluntarily stepped into a sphere separate and apart from the normal and customary activities of the average citizen; and he knowingly submits himself to pervasive, well-defined and specific governmental control. There is no constitutional doctrine guaranteeing freedom for dealing in firearms or the like; but, as seen hereinabove, there is a doctrine guaranteeing the right of travelers to free passage over public highways without interruption or search.

It should be apparent that the limited rule of the licensing cases do not apply to the broad stream of citizenry which flows each hour over roads where the Border Patrol conducts its extensive operations, yet in *Almeida-Sanchez v. United States, supra*, 413 U.S. 266, the Government contended that the licensing cases could justify a roving stop and search (*id.* at 270-272). Surely, Mr. Justice Powell was correct when, in his concurring opinion in *Almeida-Sanchez*, he said, "Colonnade and Biswell cannot fairly be read to cover cases of the present type" (*id.* at 281). Neither can these cases be fairly read to cover the multitude of intrusions on the rights of the traveling public which the

checkpoint operations accomplish every hour of every day.

The last exception to the warrant requirement calling for consideration is found in the street encounter or "stop and frisk" situation. *Terry v. Ohio*, 392 U.S. 1, held that police conduct involved in a street stop and pat-down for weapons, even though stopping short of a "technical arrest" ~~or~~ a "full-blown search," was, nevertheless, subject to Fourth Amendment restraints (*id.* at 19). The acting officer, it was said, must be aware of specific and articulable facts which, taken with rational inferences therefrom, reasonably warrant the particular intrusions; and in making such assessment the facts available to the acting officer at the moment of seizure or search must be such as would cause a reasonably cautious man to believe that the action taken was appropriate (*id.* at 21-22). It is apparent from the *Terry* case and from the later case of *Adams v. Williams*, 407 U.S. 143, that the validity of an officer's action in this situation must be justified from its inception—an initial "stop" must be justified if a subsequent "frisk" is to be upheld.

The reasoning of *Terry v. Ohio, supra*, 392 U.S. 1, and *Adams v. Williams, supra*, 407 U.S. 143, was applied in *United States v. Brignoni-Ponce, supra*, 95 S.Ct. 2574, the Court holding therein that a roving patrol of the Border Patrol must have reasonable suspicion to justify the stop of a moving vehicle and the interrogation of its occupants. But not only does this line of cases not support the procedures practiced by the Border Patrol at its checkpoints, it can fairly be said that these decisions are strong authority for the conclusion that checkpoint stops and subsequent

intrusions are illegal because such stops are routinely inflicted on every car which comes down the pike, with no articulable facts whatsoever known about a particular vehicle before it gets to the blinking lights.

C. The reasoning of *Camara v. Municipal Court* gives no support to warrantless checkpoint intrusions.

In *Almeida-Sanchez v. United States, supra*, 413 U.S. 266, Mr. Justice Powell said, in his concurring opinion (*id.* at 275-285), that roving-patrol stops and searches would be constitutionally permissible if an area-type warrant were obtained in advance; and he suggested that such a warrant could be based upon supporting information regarding the extent of illegal activity and other factors found in the area of operations, rather than upon information concerning a particular vehicle (*id.* at 283-285). Mr. Justice White, speaking for the four dissenters in this case, agreed that such a warrant would satisfy Fourth Amendment safeguards (*id.* at 288). This procedure suggested by Mr. Justice Powell would be an expansion of the doctrine formulated in *Camara v. Municipal Court*, 387 U.S. 523.

The *Camara* decision, which involved an administrative inspection for violations of a city Housing Code, advanced the proposition that in the narrow field of such administrative inspections the requirement of probable cause could be modified somewhat as a prerequisite for obtaining a warrant. It was indicated that instead of requiring specific knowledge about the condition of the particular structure to be inspected, such a warrant could be based on such factors as the

nature of the building or the condition of the entire area (*id.* at 538-539). The factors authorizing the relaxation of the probable cause requirement were: (1) a long history of judicial and public acceptance; (2) the likelihood that no other method could protect the public interests against the dangerous conditions which such administrative inspections could discover; and (3) the limited invasion of privacy which such administrative inspections, not aimed at discovery of evidence of crime, entail (*id.* at 536-537).

But neither the *Camara* opinion nor Mr. Justice Powell's concurring opinion in *Almeida-Sanchez* suggest in any way that the warrant requirement can be completely ignored. It can be noted that the specific holding in the *Camara* case was that the defendant could not constitutionally be convicted for refusing entry to a building inspector who failed to obtain a warrant. *Frank v. Maryland*, 359 U.S. 360, to the extent that it sanctioned *warrantless* inspections, was thereby overruled (387 U.S. 528). Therefore, in the present case the fact that the Border Patrol had not seen fit to obtain a warrant authorizing the operation of the Sarita checkpoint precludes reliance on these authorities to attempt to justify the invasions of Petitioner's constitutional rights.

II.

AT THE CHECKPOINT THE INDIVIDUAL'S INTERESTS OUTWEIGH THOSE OF THE GOVERNMENT.

Although the official intrusions into individual privacy, which routinely and massively occur at Border

Patrol checkpoints operated without valid warrants, are not sanctioned by any recognized exception to the warrant requirement, in *United States v. Brignoni-Ponce, supra,* 95 S.Ct. 2574, the Government sought to justify a roving patrol stop and interrogation without warrant or probable cause simply on the ground that the intrusions were "reasonable" under the Fourth Amendment when balanced against the governmental benefits derived from such operations.[10] The Court in the *Brignoni-Ponce* case did not accept this contention, but it did say that only reasonable suspicion, rather than probable cause, was required for such action (*id.* at 2580-2582). In the *Martinez-Fuerte* case, which is set for argument in tandem with the present case, the Government, in attempting to justify all checkpoint intrusions, with or without a warrant, has again heavily relied upon a balance between the public interest and the individual's right to be free from official interference,[11] this despite the obvious difficulty in finding significant distinctions between the operations of the checkpoints and the operations of the roving patrols. It therefore appears that if the checkpoint procedures without valid warrants are to be upheld it will be on the basis of a "reasonable," but new, exception chiseled from the hard shield of the Fourth Amendment. Perhaps it is desirable that, in applying the Fourth Amendment, consideration of the intrusions be balanced against the public needs. But if too many chunks are chiseled from this shield, it will soon cease to shield

[10]See *United States v. Brignoni-Ponce,* Supreme Court No. 74-114, Brief for the United States at 22-31.

[11]See *United States v. Martinez-Fuerte,* Supreme Court No. 74-1560, Brief for the United States at 16-42.

us; and it might well be that great public needs are much easier imagined than refuted.

Nevertheless, the "reasonableness" approach may be alive and well; hence the difficult balancing of private rights against governmental needs must be considered in the context of the present case. The touchstone of this approach was well and succinctly described by Mr. Justice White, speaking for the Court, in *Camara v. Municipal Court, supra,* 387 U.S. 523, as follows:

> Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails (*id.* at 536-537).

While a balance can test both sides simultaneously, herein the competing interests must be weighed in sequence.

A. The checkpoint procedures are incompatible with the personal freedoms guaranteed citizens of this nation.

As noted at the beginning of Part I of this argument, the Fifth Circuit, after the *Brignoni-Ponce* and *Ortiz* decisions were handed down, affirmed the present case and *United States v. Santibanez, supra,* 517 F.2d 922, on the ground that "[s]uch a stop is considerably less intrusive than a search" (*id.* at 923). So the nature and extent of the intrusions which the Government inflicted on Petitioner and other travelers must be considered in some detail.

The instrusions in the present case occurred in the hours of darkness on April 28, 1974, when Petitioner,

proceeding in his car north on a major highway in southern Texas, was confronted by the Border Patrol with signs, flashing lights, traffic cones, official vehicles and a uniformed agent (A. 16-17). Petitioner was forced to a complete stop,[12] and the Border Patrol agent approached close enough to Petitioner's vehicle to be able to see down into its lower interior and questioned Petitioner about his citizenship. Then, upon discovery of the four aliens, they too were asked about their citizenship (A. 13-14). Though the *Santibanez* opinion indicates that there is no search involved in the initial checkpoint intrusions, it is contended by Petitioner, as stated in Part I B of this argument, that when he came into this governmental traffic net, he was forthwith subjected to the three distinct intrusions of a stop, which amounted to taking him into official custody and control, an initial visual search[13] (and perhaps, as may

[12]Evidently the Sarita checkpoint permitted no "waive throughs" or "fleeting stops" as is attributed to its San Clemente cousin in *United States v. Martinez-Fuerte, supra,* 514 F.2d at 313, the only exception being local residents who endured this checkpoint so frequently that they could readily be recognized by an officer on duty (A. 12).

[13]The visual search of Petitioner's vehicle can not be justified on the basis of the "plain view" doctrine. One of the reasons cars are stopped and approached by an agent at the Sarita checkpoint is to afford the agent an advantageous view into the vehicle which he would not have had except for the stop (A. 25-26). In *Coolidge v. New Hampshire,* 403 U.S. 443, it was said regarding the "plain view" doctrine:

> It is well established that under certain circumstances the police may seize evidence in plain view without a warrant. But it is important to keep in mind that, in the vast majority of cases, *any* evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the "plain view" doctrine has been to indentify the circumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal (*id.* at 465).

have occurred in *Santibanez*, an olfactory search as well) and an initial interrogation.

By virtue of these intrusions Petitioner, and those preceding and following him through such checkpoints, have had invaded several important aspects of their constitutional guarantees. For one, when a motorist comes within sight of the agents at a checkpoint, he is immediately deprived of the right to free passage and movement which was described and examined in Part I A of this argument. He is in the custody and control of the agents on duty at the checkpoint from first sighting until such time as he is given permission to leave, which may or may not be a short interlude; and if he attempts to escape this arbitrary detention by declining to stop, he will surely be pursued and captured if possible.

Further, the right of personal secrecy and privacy is violated at the checkpoint. The ordinary passenger car is not fully enclosed; but when traveling at highway or even lesser speeds, it effectively furnishes a good deal of privacy to its occupants, especially in the lower interior below window level. It can be anticipated that some people will dress in a more casual, more revealing, and perhaps less socially acceptable attire when making an extended motor trip than they would dress if they were, for example, going shopping. Also, it is reasonable to assume that some travelers have items in the lower portions of their vehicles which, though legal, they would prefer not to have exposed to one or more strangers. There can be no doubt that the Fourth Amendment protects individual privacy against unreasonable intrusions by federal agents, (*Katz v. United States, supra,* 389 U.S. 347); yet at the checkpoint the

traveler is, without warrant or justifying suspicion, stopped, peered at and questioned.[14] And if an unfortunate motorist is deemed by the Border Patrol agent to "break the pattern" (which might mean anything the agent on duty at the time wants it to mean) the motorist is further favored with a barrage of rather personal verbal probes – "Where are you coming from? Where are you going? Why are you going there? Where do you live? Where do you work? Where were your born?" may be just the prologue.

In addition, the traveler has the right to be free from arbitrary governmental interference and regimentation. Free people are instinctively repelled and irritated with such continuous and massive intrustions by the Government on the general traveling public as the checkpoints effect. It may take only a few seconds to clear a checkpoint after you get to where the inspecting agent stands; but on a day of moderately heavy traffic how long do you have to wait for the opportunity to convince the agent that you are, yes truly, a United States citizen?

The point was made in *United States v. Ortiz, supra,* 95 S.Ct. 2585, that a checkpoint stop is less likely to frighten a motorist than is a stop by a roving patrol (*id.* at 2587-2588). But it is submitted that if a checkpoint stop is somewhat less frightening, it is also considerably more dangerous than a roving-patrol stop because a roving-patrol stop will not be made in the middle of a major highway. At least at the Sarita checkpoint involved in the present case and other checkpoints

[14] *McDonald v. United States,* 335 U.S. 451, stated:

> The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted (*id.* at 455-456).

operated like it, the traveler is forced to expose himself to a serious danger which he would not otherwise encounter, to-wit: He is stationary in the middle of the north-bound lane while traffic is coming up from the rear at such highway speeds as are typically employed in the Texas ranch country. This means that in order to avoid a disaster the oncoming motorist must see the Border Patrol's checkpoint signals and obey them with some promptness. It is not here suggested that a normal, sober driver would have difficulty performing these procedures.[15] However, the problem is that periodically a driver comes along who does not possess both characteristics, especially sobriety. This danger is particularly present during the hours of darkness when the ability to see is lessened, always by darkness and sometimes by alcohol.

Petitioner submits that to allow checkpoint operations like the one near Sarita to continue will surely doom a number of travelers and Border Patrol agents to untimely deaths and serious injuries. Perhaps such tragic checkpoint accidents have already taken place; but if they have not, it is certain to be only a matter of time until a drunk barrels into a checkpoint, scattering cars and agents like tenpins. The same accident could also easily be caused by brake failure, especially if the vehicle is one of the large trailer trucks which regularly

[15] The danger described is present even when traffic is light and the weather good. Apparently, the Border Patrol recognizes that the checkpoints are hazardous to motorists because the checkpoints are not operated when the weather is bad or when traffic becomes extremely heavy. See *United States v. Martinez-Fuerte, supra,* 514 F.2d at 313. At the Sarita checkpoint the north-bound traffic, which is being stopped, is separated from the south-bound traffic, which is not being stopped, only by a line of traffic cones (A. 16-17).

transport citrus and other farm products out of the Lower Rio Grande Valley of Texas. Such a highway calamity would almost be certain to cause multiple deaths. Since the danger is so obvious, there can be little doubt that it generates considerable apprehension in the prudent motorists, who, while at the checkpoint, anxiously look into their mirrors to watch the vehicles coming up from the rear. Presumably, Border Patrol agents get paid for exposing themselves to this and other hazards; but for the travelers this exposure and the accompanying apprehension is entirely gratuitous.

In considering the magnitude of these intrusions, it should be kept in mind that they are inflicted again and again on those who reside in the Lower Rio Grande Valley and in the other areas along the Mexican border. The locations of the Border Patrol checkpoints north of the Valley has effectively insured that motorists going north from this border area must encounter a checkpoint.[16] In the case of a roving patrol stop, the experience is probably isolated and perhaps even unique for an innocent motorist. But the checkpoints must be faced repeatedly by the residents of the Lower Rio Grande Valley. For many, it is several times each year; for others it is several times each month; and for still others it is more than once a week.[17] The resentment generated by the checkpoint intrusions is quite

[16]There are three checkpoints located in strategic positions which cover vehicular traffic going north from the Lower Rio Grande Valley. See *United States v. Fuentes, supra,* 379 F.Supp. 1145 (S.D. Tex.), *aff'd mem.*, 517 F.2d 1401 (C.A. 5).

[17]Account should also be taken of the people who, because they reside in the immediate vicinity of the checkpoint, must pass it almost daily (A. 12, 26).

naturally greatly magnified by repeated exposure to them. In considering the balance between the detriment to individual rights and the needs of law enforcement, it would be specious to argue that one isolated checkpoint intrusion is of little consequence, when the real consideration should be the evils occasioned by many millions of such encounters each year.

The *Brignoni-Ponce* opinion held that Mexican ancestry is at least a relevant factor in forming a reasonable suspicion that a particular individual may be an alien, and the opinion also observed that the Government had pointed out that trained officers could recognize the characteristic appearances of persons who live in Mexico by relying on such factors as the mode of dress and haircut. *United States v. Brignoni-Ponce, supra,* 95 S.Ct. at 2582. In other words, the usual illegal Mexican alien has the dark hair, eyes and skin typical of a great majority of Mexican citizens; and being, almost by definition, poor, the illegal alien is therefore poorly groomed and poorly clothed. And what of the residents of the Lower Rio Grande Valley who must pass through one of the checkpoints in order to travel into the interior of our nation? The McAllen-Brownsville area has a combined population of about 320,000.[18] A recent article in a national magazine reported that nearly 80 percent of the population of Hidalgo County, the county in which McAllen is located, is Spanish-speaking and that 74 percent of the adults in the county have not completed more than the seventh grade.[19] It is thus apparent that

[18]See *United States v. Brignoni-Ponce, supra,* 95 S.Ct. at 2581. The Lower Rio Grande Valley consists primarily of the area between McAllen and Brownsville.

[19]See *Newsweek*, November 24, 1975, p. 21.

a large portion of the residents of the Lower Rio Grande Valley likewise have dark hair, skin and eyes since their not-too-distant ancestors immigrated from Mexico. Unfortunately, many of them are also so poor that they must wear old clothes, drive old cars and get haircuts infrequently. And this large multitude, which may number in the hundreds of thousands of Valley residents, most of them native born, must face a checkpoint with the same "suspicious" physical and grooming characteristics as the illegal Mexican aliens possess, knowing full well that such an appearance, though innocent, can precipitate an extremely unpleasant and prolonged investigation at the checkpoint to which a more prosperous citizen with light coloring would not likely be subjected.

Obviously, the intrusions of the checkpoints are not equal for all the citizens who are forced to pass through them; yet the Constitution forbids the Federal Government and its agents from discriminating against individuals on the basis of race. *Cf. Bolling v. Sharpe*, 347 U.S. 497. Furthermore, it was recognized in *Terry v. Ohio, supra*, 392 U.S. at 14 n. 11,[20] that "field interrogations" are in many communities a major source of friction between the police and minority groups. The checkpoint operations unquestionably are "field interrogations," and it seems well within the realm of possibility that they give rise to such friction.

In considering the inequities of these checkpoints, it should be noted also that the wealthy are often not confronted at all by a checkpoint on their trips to the

[20]The Court quotes therein the *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police* (1967).

north. Anyone who can afford to buy or rent an airplane will miss the checkpoints entirely. There are many wealthy residents of other parts of the nation who own real estate in the Lower Rio Grande Valley; and it is quite possible that some of them do not even know of the Sarita checkpoint's existence because they fly into and out of the Valley by private aircraft.

In view of the foregoing, it would certainly appear that, as heretofore contended, the Ninth Circuit was eminently correct when it held in *Martinez-Fuerte* that the checkpoints intolerably interfere with the rights of the innocent (514 F.2d at 322).

B. Governmental needs are not well served by the checkpoint.

The Government apparently will seek to constitutionalize its asserted authority to stop and question, without warrant or suspicion, each and every motorist passing through the checkpoints on the ground the checkpoints are absolutely essential and indispensable to the effective enforcement of the immigration laws of the United States.[21] It likely will be contended that the checkpoints are much more important in apprehending illegal aliens and deterring them from coming into the country than are the roving patrols. The Government will say that there are vast numbers of such illegal aliens now within the United States, estimating the figure to be as many as 10 to 12 million, with 85

[21]See *United States v. Martinez-Fuerte*, Supreme Court No. 74-1560, Brief for the United States at 17-28.

percent having come from Mexico (see *United States v. Brignoni-Ponce, supra,* 95 S.Ct. at 2579). No other method, it will be contended, can accomplish the vital results achieved by the checkpoints which are strategically located away from the Mexican border.

In considering the Government's probable contentions regarding law enforcement needs, it is appropriate to point out that, though the Border Patrol has been operating checkpoints for many years,[22] the Immigration and Naturalization Service's estimate of illegal aliens in the country rose from one million in 1972 to as many as 10 to 12 million in 1974 (see *United States v. Brignoni-Ponce, supra,* 95 S.Ct. at 2579). These figures speak for themselves and are alone sufficient to create a very substantial doubt as to the claimed efficiency and necessity of the checkpoints if, as contended, the checkpoints are indeed the backbone of the Border Patrol's enforcement efforts. Mr. Justice White's point was well taken when, in his concurring opinion for the *Brignoni-Ponce* and *Ortiz* cases, he commented on the Government's lack of success in intercepting illegal aliens as follows:

> The entire system, however, has been notably unsuccessful in deterring or stemming this heavy flow; and its costs, including added burdens on the courts, have been substantial (95 S.Ct. at 2598).

[22]In *Fernandez v. United States,* 321 F.2d 283 (C.A. 9), it was reported that a checkpoint had been in operation for at least 31 years (*id.* at 286).

In fiscal 1973 the number of deportable aliens apprehended by the Border Patrol, which makes the great majority of such apprehensions, was 498,123.[23] Only approximately 12 percent of all apprehensions of deportable aliens throughout the nation are made at checkpoints; and in fiscal 1973 about 55,300 deportable aliens were apprehended in the United States by Border Patrol agents working the traffic-checking operations.[24] When these 55,300 apprehensions are compared to the asserted 10 to 12 million illegal aliens estimated to be in this country in 1974, most of whom must have passed through or, in some way, gone around or over the checkpoints,[25] it becomes clear that the Government's claim for the checkpoints' efficiency is not well-founded, especially if it is taken into consideration that in 1973 the Border Patrol was exercising its claimed right to open the trunks of vehicles without probable cause for such searches.[26]

The Border Patrol's statistics further reveal that in an eight-day period in June of 1974, at the San Clemente checkpoint, 171 out of 145,960 vehicles were found to

[23]See the Appendix to the concurring opinion of Mr. Chief Justice Burger in the *Brignoni-Ponce* and *Ortiz* cases, 95 S.Ct. at 2593.

[24]*Id.* at 2596.

[25]"These aliens are increasingly found in virtually all regions of the country and in all segments of the economy" (*id.* at 2592).

[26]Since such searches were held unlawful in 1975 by *United States v. Ortiz, supra,* 95 S.Ct. 2585, the prior limited effectiveness of the checkpoints must surely have dropped to an even lower level.

contain deportable aliens (see *United States v. Martinez-Fuerte, supra*, 514 F.2d at 313-314). This is a ridiculous efficiency ratio of about 0.12 percent, and shows conclusively that the checkpoint operations are like sifting a mountain to recover a pinch of gold dust. Furthermore, there were 820 vehicles that during this same period "broke the pattern" and consequently were diverted for the much more intrusive "secondary" inspection at the San Clemente checkpoint; but only about 21 precent were found to contain deportable aliens, again a shockingly low figure (*ibid.*).

If the checkpoints are not achieving their purpose, it is not due to any lack of diligence or devotion to duty on the part of the Border Patrol personnel. The Border Patrol does a commendable job, but it has been asked to do more than can in fact be accomplished with the means provided. In an effort to accomplish this task, it has turned to the checkpoints. This is not at all a unique occurrence in the field of law enforcement. For law enforcement officials, when more is demanded of them than is possible to deliver, often turn to methods which they attempt to justify on the basis of the hoped for results without sufficient weight being given to constitutional considerations. In the area of law enforcement the desire to achieve a praiseworthy goal can not be enough. The freedoms which flow from the Constitution are secure only if the police are also policed; and in regard to this paradoxical but vital principle of our system of constitutional government, Mr. Justice Powell, speaking for the Court, in *United States v. United States District Court*, 407 U.S. 297, said:

> But those charged with this investigative and prosecutorial duty should not be the sole judges of

> when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech (*id.* at 317, footnote omitted).

When the Border Patrol is provided with sufficient money, men and materials, the Mexican border can be substantially sealed at the physical boundary by the "line watch." History reflects that in the fairly recent past our nation effectively secured this same physical boundary from much deadlier and more cunning intruders than the ones who now violate it.[27] But in order to achieve the desired effectiveness, there obviously would have to be an increase in the funds appropriated for recruiting, training and maintaining

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[27]In 1916 a long revolution had reduced Mexico to starving misery. A state of virtual anarchy prevailed in the north where a bandit-turned-revolutionary calling himself Pancho Villa (Doroteo Arango) held sway. The bloody bandits of northern Mexico stealthily raided across the international boundary with such increasing frequency and ferocity that no citizen residing in the United States border country could consider himself safe. After many massacres of its border-area residents, the United States finally determined to solve the bandit problem. The army along this boundary was appropriately reinforced to the extent that there were 50,000 soldiers stationed at each of three border positions, Brownsville, El Paso and Nogales. In time the integrity of the boundary was secured against these surreptitious intruders. See *Horgan, Great River, The Rio Grande in North American History* (1954), volume 2, pages 904-936. By 1920 the number of men guarding the border had been reduced to 20,000. See the Appendix to the concurring opinion of Mr. Chief Justice Burger in the *Brignoni-Ponce* and *Ortiz* cases, 95 S.Ct. at 2593.

additional Border Patrol agents.[28] The amount of money required for this objective may not be inconsequential; however, the cost could not remotely compare to some of the expensive projects this nation has heretofore undertaken, such as, for example, giving financial aid to a throng of foreign countries.

Another possible means of controlling the flow of illegal immigrants would be to offer a substantial reward for information leading to the apprehension of an illegal alien. A reward of $50.00 per alien might have little impact on the alien problem but one of $500.00 per alien could definitely have a very substantial impact thereon, and it would also have a strong deterrent effect upon those considering a trip to the United States without official permission.[29] Granted, this too would be expensive; but as was said by the Court in the *Martinez-Fuerte* case, "[n]onetheless, the mere fact that protecting a constitutional right will impose a heavy burden on the federal fisc is not a proper ground for our failing to protect that right" (514 F.2d at 318-319).

The foregoing examples concerning the methods which could solve the illegal alien problem, if we are

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[28]There are, incredibly, only about 1,360 Border Patrol agents assigned to the 2,000 miles of southern border. This is about 80 percent of the nation's entire force; hence it is apparent that many more agents are needed by the Border Patrol. See the Appendix to the concurring opinion of Mr. Chief Justice Burger in the *Brignoni-Ponce* and *Ortiz* cases, 95 S.Ct. at 2593.

[29]For an example of the reward approach that is perhaps somewhat limited in scope, see 18 U.S.C. 3056 which authorizes the Secret Service to offer and pay rewards for services ~~leading to~~ information looking toward the apprehension of criminals.

but willing to pay the necessary price, are certainly not exhaustive. But there also appear to be certain legislative measures, which, if adopted, would clearly prove to be more effective than the checkpoints and which would cost this nation much less money to implement than would the foregoing suggestions. A statute making it unlawful to employ illegal aliens and providing adequate criminal sanctions for its violation, is the most promising horse in this stable. It is ridiculous to expect to solve a problem involving millions of people when we are not even willing to punish the problem's real creators—the employers who directly or indirectly lure these unfortunate people to this country and sustain them when they arrive. The people most adversely affected by the checkpoints are those who live in the strip of this nation between the border and the checkpoints, yet the problem is not of their making. The aliens in question come from the south of this area and simply pass through it on their way to the north, while the residents of the border area are the ones primarily called upon to pay the checkpoints' constitutional "toll," supposedly to protect the other parts of the nation where the illegal aliens find succor. This irony seems more than slight. We should punish the guilty and let the innocent forego the checkpoints.

Another piece of legislation which, if enacted, could prove very helpful in solving this problem is one requiring the seizure and forfeiture of vehicles used to knowingly transport illegal aliens. No doubt the statutes now existing which authorize the seizure and forfeiture of vehicles used to carry narcotics and other unlawful items have proven helpful to enforcement of laws in

that area.[30] Again, these examples of possible legislation are certainly not exhaustive but illustrate that the national interests involved in enforcing the immigration laws can be solved in other and better ways than by impinging on constitutional guarantees.

None of the foregoing is to imply that the Border Patrol would be rendered powerless by the closing of its checkpoints. On the contrary, it has other weapons such as, for example, the employment of electronic detection equipment at or very near the physical boundary.[31] In this regard, it can be observed that in fiscal 1973 there were 175,511 deportable aliens apprehended throughout the nation by Border Patrol agents assigned to the "line watch" at the physical boundary, while, as stated previously, only 55,300 deportable aliens were apprehended by Border Patrol agents working traffic-checking operations.[32] It therefore appears that the "line watch" is in fact the backbone of the Border Patrol's defense against illegal aliens, not the checkpoints. Borrowing from the wisdom of another combative, but far less serious activity, it can be observed that every football player who has tried to catch an illusive runner in an open field knows that a good line is the best defense.

The argument that a particular police procedure is absolutely necessary to protect a national interest in law enforcement is always advanced when the particular procedure is attacked on constitutional grounds. For

[30]See 19 U.S.C. 1595a(a); 21 U.S.C. 881(a)(4); and 49 U.S.C. 782.

[31]See the Appendix to the concurring opinion of Mr. Chief Justice Burger in the *Brignoni-Ponce* and *Ortiz* cases, 95 S.Ct. at 2594.

[32]*Id.* at 2594, 2596.

example, in *Almeida-Sanchez v. United States, supra,* 413 U.S. 266, the Government argued that the only feasible means of apprehending illegal aliens who surreptitiously entered this country was by the Border Patrol's roving patrols (*id.* at 276, concurring opinion of Mr. Justice Powell). Now the Government maintains that the checkpoints have always been the single most important element of this enforcement program.[33] But the facts do not support the Government's present position; instead, they clearly indicate that the national interests are not well served by these checkpoints.

C. The checkpoint is a cancer in our free society, and this malignancy should be excised before it spreads.

Consideration has been given to the intrusions which are still being perpetrated daily at the checkpoints; but if a true balance is to be made between the good and the evil of the checkpoints, one extremely important consideration must still be placed on the judicial scales. For a highly compelling reason why the permanent checkpoints should now be held unconstitutional is that they possess great and inherent potential for political abuses. (It is not herein suggested in any way that the checkpoints have already been so used.)

The permanent checkpoints are Orwellian devices with great potential for population manipulation and

[33]See *United States v. Martinez-Fuerte,* Supreme Court No. 74-1560, Brief for the United States at 19-20.

governmental oppression. The abuses to which they could readily be adopted if they ever came under the control of a domineering political party bent on perpetuating itself in power should be justification enough to invoke constitutional protections.[34] There is little doubt that the permanent traffic checkpoint is, and has long been, one of the traditional tools employed by totalitarian governments.

In considering the danger to this nation implicit in the use of the checkpoint for any purpose, however noble, the thoughts of the eloquent jurist, Judge Learned Hand, which he ably expressed in *United States v. Kirschenblatt*, 16 F.2d 202 (C.A. 2), appear particularly pertinent:

> Such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go pari passu with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition (*id.* at 203).

These fixed and permanent policing devices should not be considered only in terms of the Mexican border. The checkpoint bell can toll for the rest of the United States. For how would it be logical, reasonable and fair to hold that checkpoints are constitutional, but only if located in southern Texas, southern New Mexico,

[34]Of course, if any dominant political party should ever choose the nefarious path of systematic political repression, the checkpoints would be only one arrow in its heinous quiver. But this arrow would be there, ready to be strung to the bow of repression.

southern Arizona and southern California? The illegal alien problem is located in the much more prosperous parts of this nation where the great industry dwells. The area of the Mexican border is not the land of milk and honey for the illegal alien. The milk is in Detroit, and the honey is in Chicago.

Also, these fixed and permanent policing devices should not be considered only in terms of the Border Patrol. What is sauce for the goose surely must be sauce for the gander. Perhaps the Internal Revenue Service could determine that a certain large metropolitan area is a hotbed for income tax evasion. Why not then set up permanent checkpoints at strategic locations selected by high-ranking Internal Revenue officials to ask the occupants of every vehicle their names, if they filed income tax returns for the three previous years and, if so, where? (Of course, the model and make of the stopped car could be noted for comparison with the driver's recent tax returns, if his returns are found.) Or perhaps the local police in a large city might determine that a particular district was overrun with prostitutes. Could permanent checkpoints be set up, either on streets or on sidewalks or on both, to inquire as to the occupation of each person passing? And if the person questioned happened to be a woman with certain observable physical and grooming characteristics, could she then be referred to "secondary" for a more extensive investigation?

The foregoing proposals obviously should be considered unconstitutional. Likewise, the routine checkpoint stop, visual search of the vehicle's interior and a "brief question or two" by the Border Patrol, all without warrant or specific suspicion, should be held to violate

Fourth Amendment guarantees. If Border Patrol checkpoints are held constitutional, then a number of other police organizations, charged with enforcing what some might consider more vital and important criminal laws than those in the immigration field, will undoubtedly cast covetous eyes on the permanent checkpoints; and in the normal and inevitable course of events, other police organizations will start to employ these fixed devices with increasing frequency in their own operations. In this way we could slowly but surely become a nation infested with numerous checkpoints aimed at impeding sundry types of criminal activity, and this would indeed be a sad eventuality for our freedom.[35]

If the illegal alien problem is of great importance to the existence and welfare of this nation, then we must rid ourselves of it. But this riddance should be achieved at the cost of money and materials and not at the cost of our personal liberties. The checkpoint is a cancer in our free society. This malignancy should be excised before it spreads.

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[35]It is not suggested herein that traffic stops to enforce state license requirements or safety standards could not be constitutional if conducted within the bounds of reasonable limits. However, even such license and safety checks should not be accomplished by ringing a selected area with permanent checkpoints which operate on a constant and continuing basis, month after month and year after year, for this would move such operations from the realm of reasonable preventive police action into the domain of oppressive governmental interference with such an area's unfortunate traveling citizens. Also, it is not suggested herein that roadblocks could not lawfully be employed by police to attempt to apprehend fleeing criminals in an exigent situation such as a kidnapping or a bank robbery. But when such a temporary emergency is over, the roadblocks should promptly be removed.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals affirming the conviction of Petitioner should be reversed.

Respectfully submitted,

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Supreme Court, U. S.
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No. 75-5387

In the Supreme Court of the United States

OCTOBER TERM, 1975

RODOLFO SIFUENTES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
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OPINIONS BELOW

The opinion of the court of appeals (A. 58) is not reported. Its order of affirmance is noted at 517 F. 2d 1402. The opinion of the district court (A. 31–32) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1975. The petition for a writ of certiorari was filed on September 4, 1975, and was granted on November 11, 1975 (A. 59). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Border Patrol officers may lawfully stop northbound vehicles at a fixed immigration checkpoint in the Mexican border area in order to make routine inquiries concerning the nationality and immigration status of the occupants of the vehicles.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on four counts of transporting aliens who were present in this country unlawfully, in violation of 8 U.S.C. 1324(a)(2). He was sentenced to concurrent terms of two years' imprisonment on counts 1 and 2, with all but six months of the sentence suspended in favor of three years' probation. In addition, he was sentenced to concurrent terms of two years' imprisonment on counts 3 and 4, to run consecutively with the sentences imposed on counts 1 and 2; the sentences on counts 3 and 4, however, were suspended

in favor of three years' probation (A. 54–55). The court of appeals affirmed (A. 58).

1. The evidence at petitioner's trial[1] established that the vehicle he was driving was stopped at a permanent immigration traffic checkpoint near Sarita, Texas, at about 3:00 a.m. on April 28, 1974, as he was traveling north on U.S. Highway 77 about 65–90 miles north of the Mexican border (A. 11–13, 15–16). When Border Patrol Agent Gustavo DeLeon approached petitioner's vehicle, petitioner called out, "Hi, Champion" (A. 13, 24). Champion was the name of another agent assigned to the area (A. 23). Agent DeLeon replied that he was not Champion, informed petitioner that he was conducting an immigration inspection, and asked petitioner if he was a citizen of the United States (A. 13). Petitioner responded that he was a citizen and that he was from Weslaco, Texas (*ibid.*).

At about that time, Agent DeLeon observed four other persons in the vehicle, one in the front seat and three in the rear, who were slumped down in the seats as if asleep (A. 13, 17, 22–24). Upon questioning, the four passengers stated that they were Mexican citizens, and the officer determined that they had no documentation authorizing them to be in this country (A. 13–14). Petitioner and the four aliens were then taken into custody (A. 13–14, 17–18).

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[1] No separate hearing was held on petitioner's pre-trial motion to suppress the evidence derived from the stop of his vehicle. The court reserved ruling on the motion until evidence relating to the stop of the vehicle was presented at trial (A. 9–11).

The four aliens who were apprehended testified at the trial that, in accordance with prior arrangements, petitioner picked them up and transported them north after they had illegally crossed the border by swimming the Rio Grande River (Tr. 43–145).[2]

2. Highway 77 originates in Brownsville at the Mexican border and is one of two major arteries leading north out of the lower Rio Grande valley (A. 12, 18–19). The checkpoint is marked by appropriate signs and warning lights and is illuminated by floodlights during hours of darkness (A. 12, 16–17). A permanent sign, about one-half mile to the south of the checkpoint, warns northbound motorists to slow down (A. 12). Approximately 260 yards south of the checkpoint is a sign with a flashing amber light indicating that motorists must stop ahead (A. 12, 16). At the checkpoint itself is a sign marked "Stop, U.S. Officers," with a red flashing light atop (A. 12, 16–17). Cones are placed in the road to aid traffic control (A. 16–17).[3]

The facility is operated 24 hours a day, except when inclement weather or manpower shortages require its closing (A. 12, 15). The officers on duty customarily stop all northbound vehicles except those whose occupants the officers recognize as local inhabitants of the area (A. 12, 16, 26). That was the procedure the officers were following when petitioner's vehicle was stopped (A. 16).

[2] The question whether such voluntary testimony of a witness at trial is properly subject to suppression as the fruit of an allegedly illegal stop was not raised in the courts below, and we do not raise it here.

[3] For the Court's convenience, we have reproduced in the appendix to this brief, *infra*, p. 1a, an official Border Patrol photograph of the Sarita checkpoint.

3. At the close of the government's case, the district court orally denied petitioner's motion to suppress, stating that a written opinion would follow (A. 28–29). The motion was renewed and denied again at the close of all the evidence (A. 29–30).

The district court subsequently filed a written memorandum denying the motion to suppress (A. 31–32), relying on its previous opinion in *United States* v. *Fuentes*, 379 F. Supp. 1145, affirmed, 517 F. 2d 1401 (A. 33–46). In *Fuentes*, the district court ruled that the immigration checkpoint near LaGloria, Texas, was the "functional equivalent of the border" (A. 37) and that the Border Patrol could accordingly conduct routine stops of vehicles there without violating the Fourth Amendment. The court in *Fuentes* also concluded that the same rationale could be applied to the Sarita checkpoint (A. 34).

On appeal in the present case, the court of appeals affirmed summarily on the authority of its decision in *United States* v. *Santibanez*, 517 F. 2d 922, which upheld the validity of a routine, warrantless stop of a vehicle at an immigration checkpoint for the purpose of inquiring about the occupant's citizenship and immigration status. Noting that the lawfulness of checkpoint stops was reserved by this Court in *United States* v. *Ortiz*, 422 U.S. 891, 897, n. 3, the court in *Santibanez* held (517 F. 2d at 923):

> We find no constitutional dereliction in stoping vehicles at this permanent checkpoint for the purpose of determining the occupant's citi-

zenship. Such a stop is considerably less intrusive than a search * * *.

After this Court granted the petition for a writ of certiorari in *United States* v. *Martinez-Fuerte*, No. 74–1560—which involves the lawfulness of checkpoint stops conducted pursuant to a judicial warrant—we filed a memorandum suggesting that it would be appropriate to grant the petition in the present case as well, since it squarely presents the question whether such stops may properly be made in the absence of a warrant. The Court granted the petition and set the case for oral argument in tandem with *Martinez-Fuerte* (A. 59).

ARGUMENT

THE STOP OF PETITIONER'S VEHICLE AND THE BRIEF INQUIRIES CONCERNING THE OCCUPANTS' NATIONALITY AND IMMIGRATION STATUS WERE REASONABLE UNDER THE FOURTH AMENDMENT

The checkpoint stop and inquiry procedure followed by the Border Patrol officers in this case, like the roving patrol stop and inquiry in *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878, "involve[d] only a brief detention short of traditional arrest." Its constitutional validity accordingly must be tested under "the reasonableness requirement of the Fourth Amendment" (*id.* at 882), which in turn "depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers" (*id.* at 878). The Court's view of that balance in *Brignoni-Ponce* led it to conclude that officers on roving patrol may stop vehicles to

inquire about the occupants' citizenship and immigration status "only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country" (*id.* at 884).

We have argued in our brief in *United States* v. *Martinez-Fuerte*, No. 74–1560, that the reasonableness balance shifts in the context of checkpoint stops, because the law enforcement need to conduct routine stops and inquiries at checkpoints is substantially greater, and the intrusions upon protected Fourth Amendment interests are substantially reduced.[4] Although the stops in *Martinez-Fuerte*, unlike the stop in the present case, were authorized by a judicial warrant issued on a showing of area-type probable cause, our threshold argument in that case is that the stops were reasonable without regard to the warrant (Br. 16–42).

Rather than repeating that argument, we rely here on our brief in *Martinez-Fuerte* and limit ourselves to the following additional observations in response to petitioner's contentions.

1. Petitioner's argument rests on a grossly inflated characterization of the intrusion occasioned by the checkpoint stop and inquiry procedure. If, as this Court stated in *Brignoni-Ponce*, "the interference

[4] Our brief in *Martinez-Fuerte* (together with our briefs in *Brignoni-Ponce* and *United States* v. *Ortiz*, 422 U.S. 891) were served on counsel for petitioner in this case, and petitioner's brief responds to some of our arguments in *Martinez-Fuerte* (see, *e.g.*, Pet. Br. 28, 37 n. 21, 45 n. 33).

with individual liberty that results when an officer [on roving patrol] stops an automobile and questions its occupants" may fairly be described as "modest" and "limited" (422 U.S. at 879–880, 883), it is difficult to understand why a stop and inquiry at a checkpoint results in a "massive" invasion (Pet. Br. 32) of the traveler's "right to free passage and movement" as well as his "right of personal secrecy and privacy" (Pet. Br. 31).

As we argued in *Martinez-Fuerte* (Br. 28–33), the brief interruption in travel caused by a checkpoint stop is little more intrusive than the interruption caused by a traffic light or stop sign. Motorists are not pursued by a patrol car with flashing lights and siren. There is no search of the vehicle or its occupants. Contrary to petitioner's assertion, the motorist is not ordinarily subjected to "a barrage of rather personal verbal probes" (Br. 32).[5]

Nor does the motorist suffer any substantial invasion of privacy when the officer looks into the car through the passenger compartment's windows, for

[5] Petitioner asserts that, although a checkpoint stop may be less frightening to a motorist than a roving patrol stop, "it is also considerably more dangerous" (Br. 32). "[I]t is certain to be only a matter of time," petitioner says, "until a drunk barrels into a checkpoint, scattering cars and agents like tenpins" (Br. 33). Petitioner's speculative claim is unfounded. As the court in *United States* v. *Baca*, 368 F. Supp. 398 (S.D. Cal.), correctly found, safety is one of the "primary factors in selecting a checkpoint site" (*id.* at 406). A suitable location requires "an unobstructed view of oncoming traffic, to provide a safe distance for slowing and stopping; parking space off the highway; power source to illuminate control signs and inspection area, and bypass capability for vehicles not requiring examination" (*ibid.*; emphasis omitted).

"the visual inspection is limited to those parts of the vehicle that can be seen by anyone standing alongside" (*United States* v. *Brignoni-Ponce, supra,* 422 U.S. at 880). As four members of this Court stated in *Cardwell* v. *Lewis,* 417 U.S. 583, 590:

> One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public throughfares where both its occupants and its contents are in plain view.

2. Petitioner argues (Br. 35–37) that checkpoint operations discriminate against persons of Mexican ancestry or appearance. But even at those checkpoints where only a small proportion of the passing vehicles is subject to the stop and inquiry procedure, the officers do not select vehicles for a stop and inquiry on the basis of the skin color or ethnic characteristics of the occupants (see our reply brief in *Ortiz,* No. 73–2050, at pp. 10–14). Petitioner's groundless charge of discrimination is particularly inappropriate with respect to the Sarita checkpoint involved here, for the record shows that the officers there ordinarily stop all vehicles (apart from those containing local inhabitants) and were following that procedure at the time petitioner was stopped (A. 12, 16, 26).[6]

[6] It follows that the officers at the Sarita checkpoint exercise substantially less discretion in selecting vehicles for a stop and inquiry than do their counterparts at the San Clemente checkpoint, where the volume of traffic forecloses the stopping of every vehicle (see our brief in *Martinez-Fuerte*, pp. 32–33).

3. Petitioner contends (Br. 38–40) that the large number of illegal entrants in this country demonstrates the inefficiency of the traffic checkpoints. But the fact that millions of illegal immigrants may have evaded apprehension does not contradict the overwhelming evidence that the Border Patrol's traffic checkpoints are highly effective in deterring millions of others from entering this country unlawfully. The district court in this case incorporated (A. 32) its finding in *United States* v. *Fuentes, supra,* 379 F. Supp. at 1149 (A. 38), that "it is the existence of the checkpoints that keeps the flow [of illegal entrants] at a manageable level." See also *United States* v. *Baca,* 368 F. Supp. 398, 407 (S.D. Cal.).

Petitioner also argues that there are practical alternatives to the use of checkpoints (Br. 41–45). His assertion that "with sufficient money, men and materials, the Mexican border can be substantially sealed at the physical boundary by the 'line watch'" (Br. 41), and his contention that a law proscribing the employment of illegal aliens would obviate the need for checkpoints (Br. 43), are answered in our brief in *Martinez-Fuerte,* pp. 26–27. Whatever may be the utility of petitioner's additional suggestions—offering a $500 bounty for information leading to the apprehension of each illegal entrant (Br. 42) and authorizing the seizure and forfeiture of vehicles used to transport aliens (Br. 43–44)—we doubt that either

would significantly diminish the need for the authority to make brief stops and inquiries at checkpoints that Congress has conferred.

4. Petitioner argues that approval of the checkpoint stop and inquiry procedure used here could lead to Internal Revenue Service checkpoints in large metropolitan areas to ask motorists whether they have filed federal income tax returns, or to local police checkpoints on sidewalks to ask passersby whether they are prostitutes (Br. 47). Neither situation would be remotely comparable to the immigration traffic checkpoints. A holding that the stop of petitioner's vehicle was reasonable under the Fourth Amendment need not imply that any checkpoint stop and inquiry, wherever conducted and whatever its purpose, would also be reasonable.

The Border Patrol's checkpoint operations, unlike the operations hypothesized by petitioner, "are incidental to the protection of the border and draw a large measure of justification from the Government's extraordinary responsibilities and powers with respect to the border" (*Almeida-Sanchez* v. *United States,* 413 U.S. 266, 279, Mr. Justice Powell concurring). That "other police organizations" might seek uncritically to extend the principles justifying the Border Patrol's stop and inquiry procedure to dissimilar situations (Pet. Br. 48) is not a reason to hold that the stop of petitioner's vehicle violated the Fourth Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

United States Border Patrol Checkpoint – U.S. Highway 77, 12 miles south of Sarita, Texas

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Petitioner,

v.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

In its brief herein the Government attempts to distinguish its checkpoint operations from the roving patrol stops without cause or reasonable suspicion which were held to be unconstitutional in *United States v. Brignoni-Ponce*, 422 U.S. 873, on the grounds (1) that the law enforcement need for the checkpoints is much greater than is such need for roving patrols and (2) that the magnitude of the intrusions practiced at the checkpoints is less than the intrusions of the roving

patrols (Resp. Br. 7). In regard to its first contention, the Government offers no explanation as to why in the case of *Almeida-Sanchez v. United States*, 413 U.S. 266, it made a convincing showing that "roving checks of automobiles *are the only feasible means* of apprehending them [illegal aliens]" (*id.* at 276, concurring opinion of Mr. Justice Powell, emphasis added) but it now maintains, without benefit of proof, that the law enforcement need for checkpoints is much greater than the need for roving patrols. It appears that between *Almeida-Sanchez* and the present case the Government's evaluation of the relative importance of its various types of enforcement activities in the immigration field has somehow undergone a striking reversal.

I.

AS TO THE MAGNITUDE OF THE INTRUSIONS

In support of its contention that the checkpoints are substantially less intrusive than roving patrols, the Government has favorably compared its checkpoint operations to "the interruption caused by a traffic light or stop sign" (Resp. Br. 8). While it is true that both procedures involve stopping at signals, that is where the similarity in this tortured analogy ends. If the State of Texas were to position permanently a Texas Ranger at a selected traffic stop sign, where the Ranger forced each passing motorist to roll down his car window so the Ranger could ask him a "few" questions and visually search the interior of the vehicle (while hitching

up his gun belt), then such a traffic stop would resemble a checkpoint, but only with the added condition that any time the officer did not feel that the motorist conformed with the officer's concept of "the pattern", then the officer could direct the motorist to the side of the road for further interrogation, which might include, "You wouldn't mind opening your trunk would you, buddy?" Once the analogy is correctly drawn, the unconstitutionality of the intrusions becomes apparent.[1]

II.

AS TO THE DISCRETION OF THE BORDER PATROL AGENTS AT THE SARITA CHECKPOINT

The Government contends that the practices at the Sarita checkpoint are not discriminatory because Border

[1] The photograph of the Sarita checkpoint which is attached as an appendix to the Respondent's brief (Resp. Br. 1a) illustrates the danger to which both motorists and Border Patrol agents are exposed when the north-bound lane of the only highway in this remote area is blocked by a stopped vehicle. (This hazard is discussed at pages 32-34 of Petitioner's brief.) The photograph's background gives some clue to the unrelenting character of the ranch country in southern Texas. If a fast-moving motorist, approaching a vehicle stopped at this checkpoint from the rear, failed to stop because of brake failure or intoxication, the oncoming motorist would (1) strike the stopped vehicle, or (2) go to the right and strike the agent standing by the stopped vehicle or perhaps hit the border patrol vehicles parked next to the paved shoulder, or (3) go to the left and encounter any traffic which might be traveling south at the time.

Patrol officers stop all vehicles passing this checkpoint except those containing "local inhabitants" (Resp. Br. 9). It should first be noted that the innocuous-sounding exception to this general rule contains a certain amount of discretion, for who determines the criterion for a "local inhabitant" and how does the Border Patrol agent on duty decide whether an approaching motorist meets this criterion? In this regard Border Patrol agent De Leon testified as follows: "If I know the person, like I said, local residents or people that go through that checkpoint more than once, every other day, I just motion them to go ahead from where I stand" (A. 26). It is extremely doubtful that all agents who work this checkpoint select the same "local inhabitants" to wave through without stopping.

Aside from such free passes through the Sarita checkpoint, the Government appears to reason that the fact that all the other vehicles are stopped proves that their occupants are accorded the same treatment. This reasoning ignores the obvious: the stop is merely the overture for the checkpoint procedures which can range from a single question to a prolonged period of interrogation with a possible visit to "secondary". Whether there is only one question or a full-blown inquiry into the ancestry, history and present activities of the traveler is entirely in the discretion of the Border Patrol agent on duty. To contend that a darker citizen of Mexican extraction is not likelier to receive the more extended and more intrusive reception than is one of light coloring violates the bounds of credibility and is plainly not correct.

III.

AS TO AN EFFECTIVE "LINE WATCH"

The Government in its brief in the present case (at page 10) refers to its brief in the *Martinez-Fuerte* case (at pages 26-27) where it argues that strengthening the "line watch" could not obviate the alleged necessity for checkpoints situated many miles from the physical boundary. In regard to the Government's present approach to the "line watch" operations, a newspaper article reports that for three days each year anyone may cross from Mexico into Laredo, Texas, with no questions asked.[2] This surprising occurrence takes place in connection with the annual George Washington's Birthday Celebration at Laredo, and it is called the "Free Pass into America" or "*Paso Libre America.*" During a three-day period the international bridge at Laredo is open for all to enter, but foreign visitors are forbidden to leave the city limits of Laredo unless they possess proper papers allowing them to continue into the interior of the United States. Roadblocks are set up on all five roads leading out of Loredo and are operated for a month after the celebration. It was reportedly estimated that 20,000 persons (10 percent of those crossing) would slip out of Laredo and start north.

One wonders what the impact of this "Free Pass into America" has had on the efficiency of the "line watch" operations and how many illegal aliens are now at large in the United States as a result of this abandonment of the usual "line watch" procedures. Can a dam which

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[2] Hillinger, *Legal or Not, Everyone is Welcome in Laredo*, Los Angeles Times, February 22, 1976, Part 1, at pages 1, 20 and 21.

automatically opens three days out of the year really be said to be much of a dam?

IV.

AS TO LIMITING THE USE OF CHECK-POINTS BY POLICE ORGANIZATIONS

In its brief (Resp. Br. 11) the Government contends that the use of permanent checkpoints as a policing device, though constitutional when used within 100 air miles of the border to enforce immigration laws, could and should be considered unconstitutional if employed by police in other situations. In advancing this contention it would seem that the Government, at least implicitly, admits that the intrusions into privacy perpetrated at the checkpoints are not the mere bagatelles they are elsewhere pictured to be.[3] Furthermore, there are surely many vital areas in the law enforcement spectrum that are constitutionally entitled to the same policing tools as are permitted the inland enforcement of the immigration laws.

If the permanent checkpoints were held to be lawful, but only if employed within 100 air miles of an international border, they would still hold great and inherent potential for political abuse and mischief (Pet. Br. 45-46). There would be millions of citizens residing in the border areas of the United States who could be oppressed by the systematic misuse of these devices for the devious purposes of a domineering political party seeking to perpetuate its power.

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[3]See Part I of this reply brief and the Government's brief in *United States v. Martinez-Fuerte*, Supreme Court No. 74-1560, at pages 28-33.

CONCLUSION

For the reasons set forth in Petitioner's brief and in this reply brief, the judgment of the Court of Appeals affirming the conviction of Petitioner should be reversed.

Respectfully submitted,

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